TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 529.

UNION LIME COMPANY, PLAINTIFF IN ERROR,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME AND STONE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED APRIL 20, 1913.

(23,656)

(23,656)

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INDEX.

	Original.	Print
Petition for writ of error	1	1
Assignment of errors	1	1
Allowance of writ of error	4	2
Writ of error	6	3
Citation and service	10	4
Bond on writ of error	13	6
Clerk's certificate as to lodgment	17	7
Præcipe for record	18	8
Caption	20	9
Proceedings in circuit court of Fond du Lac county	21	9
Petition of Chicago & Northwestern Ry. Co.	22	9
Blue print map	27	12
Answer of Union Lime Co.	29	13
Exhibit A—Order of Railroad Commission of Wisconsin, June 30, 1911	35	16
Order appointing commissioners	38	16
Order taking motion for leave to intervene under advisement	46	22
Order granting leave to intervene	47	22
Order taking cause under advisement	48	22
Judgment	49	23
Opinion	51	24
Clerk's certificate	55	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1913.

1 In Supreme Court, State of Wisconsin.

In re Application of Chicago & Northwestern Railway Company to Condemn Certain Real Estate in Section 6, Township 14 North, of Range 18 East, in Fond du Lac County, Wisconsin, for Right of Way for Spur-track.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Petitioner & Respondent; Eden Independent Lime & Stone Company, Intervener & Appellant,

v.

UNION LIME COMPANY, Defendant and Appellant.

Considering itself aggrieved by the final decision of the supreme court of Wisconsin in rendering judgment against it in the above entitled case, the defendant, Union Lime Company, hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond:

And the said Union Lime Company assigns the following errors in the records and proceedings of the said case:

1. The supreme court of Wisconsin erred in affirming the order or judgment of the circuit court of Fond du Lac County, Wisconsin, in said case.

2. The supreme court of Wisconsin erred in holding and deciding that the said order or judgment of the circuit court of Fond du Lac County, Wisconsin, and the said decision and judgment of
2 the said supreme court of Wisconsin do not take the property of the defendant Union Lime Company for a private use.

3. The said supreme court of Wisconsin erred in holding and deciding that the said judgment of the circuit court of Fond du Lac County, Wisconsin, and the said decision and judgment of the said supreme court of Wisconsin, do not deprive the said defendant Union Lime Company of its property without due process of law, contrary to the provisions of the 14th amendment to the constitution of the United States.

4. The said supreme court of Wisconsin erred in holding and deciding that the said order or judgment of the circuit court of Fond du Lac County, Wisconsin, and the said decision and judgment of the said supreme court of Wisconsin do not deny to the said defendant Union Lime Company the equal protection of the laws, contrary to the provisions of the 14th amendment to the constitution of the United States.

5. The said supreme court of Wisconsin erred in holding and deciding that sections 1797-11*m* and 1797-12*n* of the Wisconsin Statutes, the same being chapter 352 of the laws of Wisconsin for the year 1907, as amended by chapter 481 of the laws of Wisconsin for the year 1909, are valid. The validity of said sections was denied and drawn in question by the defendant on the ground of their being

repugnant to the constitution of the United States and particularly to the 14th amendment to the said constitution and in contravention thereof. The grounds of the invalidity of said sections and the errors of the said supreme court of Wisconsin in respect thereof in its said decision and judgment are hereinafter more particularly stated.

6. The said supreme court of Wisconsin erred in holding and deciding that the said sections 1797-11*m* and 1797-12*n* of the Wisconsin Statutes do not authorize the taking of private property
3 and of the property of this defendant for private uses, contrary to the provisions of the 14th amendment to the constitution of the United States.

7. The said supreme court of Wisconsin erred in holding and deciding that the said sections 1797-11*m* and 1797-12*n* of the Wisconsin Statutes as applied by the said circuit court of Fond du Lac County, Wisconsin, and the said supreme court of Wisconsin to this defendant in this case do not deprive this defendant of its property without due process of law, contrary to the provisions of the 14th amendment to the constitution of the United States.

8. The said supreme court of Wisconsin erred in holding and deciding that said sections 1797-11*m* and 1797-12*n* of the Wisconsin Statutes as applied by the said circuit court of Fond du Lac County and the said supreme court of Wisconsin to this defendant in this case do not deny to this defendant the equal protection of the laws, contrary to the provisions of the 14th amendment to the constitution of the United States.

9. The said supreme court of Wisconsin erred in holding and deciding that the order of the railroad commission mentioned and set forth in the petition and answer in this case, which said order was made under and pursuant to said sections 1797-11*m* and 1797-12*n*, does not take the property of this defendant for private uses, and does not deprive this defendant of its property without due process of law, and does not deny to this defendant the equal protection of the laws, contrary to the provisions of the 14th amendment to the constitution of the United States.

For which said errors the defendant Union Lime Company prays that the said judgment of the supreme court of the state of Wisconsin entered and dated March 11, 1913, be reversed and a
4 judgment rendered in favor of the said defendant Union Lime Company and for costs.

LINES, SPOONER, ELLIS & QUARLES,
GEORGE LINES,
W. M. SPOONER,
FRED C. ELLIS,
LOUIS QUARLES,
Attorneys for Defendant Union Lime Company.

STATE OF WISCONSIN,
Supreme Court, ss:

Let a writ of error issue as prayed in the foregoing petition upon the execution of a bond by the Union Lime Company to the Chicago

& Northwestern Railway Company and the Eden Independent Lime & Stone Company in the sum of Ten thousand dollars, such bond when approved to act as a supersedeas.

Dated March 18, 1913.

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

[Seal Supreme Court of Wisconsin.]

5 [Endorsed:] Supreme Court—State of Wisconsin. In re Condemnation Proceedings: Chicago & N. W. Ry. Co., Petitioner & Respondent, Eden Independent Lime & Stone Co., Intervener & Appellant, v. Union Lime Company, Defendant & Appellant. Petition for Writ of Error, Assignment of Errors and Prayer for Reversal. Original. Filed Mar. 26 1913. Clarence Kellogg, Clerk of Supreme Court, Wis. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Chicago & Northwestern Railway Company, Eden Independent Lime & Stone Company and Union Lime Company, corporations, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Union Lime Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-
7 preme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right,

ance according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of March, in the year of our Lord one thousand nine hundred and thirteen.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk District Court of the United States for the Western District of Wisconsin.
By GEORGE C. HOLMES,
Deputy.

Allowed, March 26th, 1913.

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

[Seal Supreme Court of Wisconsin.]

8 STATE OF WISCONSIN,
Supreme Court, ss:

The Return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG, *Clerk.*

9 [Endorsed:] Original. No. —. In the District Court of the United States for the Western District of Wisconsin. Union Lime Company, Plaintiff in Error, vs. Chicago & Northwestern Railway Company and Eden Independent Lime & Stone Company, Defendants in Error. Writ of Error. Filed Mar. 26, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

10 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chicago & Northwestern Railway Company and Eden Independent Lime & Stone Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Wisconsin, wherein the Union Lime Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Wisconsin, this 26th day of March, 1913.

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

Attest:

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court of Wisconsin.

11 The undersigned, attorneys of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

EDWARD M. SMART,
Attorney for Chicago & Northwestern Railway Company.

____ ____,
Attorney for Eden Independent Lime & Stone Company.

12 [Endorsed:] # 1479. United States Supreme Court. Union Lime Company, Plaintiff in Error, v. Chicago & Northwestern Ry. Co., and Eden Independent Lime & Stone Co., Defendants in Error. Citation and Admission of Service. Rec'd at Marshal's Office, Milwaukee, Wis., Apr. 2, 1913. Original. Filed Apr. 5, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Served the within Writ on the within named Eden Independent Lime & Stone Company by delivering a true copy thereof to L. E. Lurvey, Attorney of Record for said Company, on this the third day of April, A. D. 1913, at Fond du Lac.

Marshal's Fees:

Service	2.00
Travel	3.20
	5.20

H. A. WEIL, *U. S. Marshal.*

13 STATE OF WISCONSIN:

In Supreme Court, January Term, 1913.

No. 43.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Petitioner and Respondent; Eden Independent Lime & Stone Company, Intervenor and Respondent,

vs.

UNION LIME COMPANY, Defendant and Appellant.

In the Matter of the Application of Chicago & North Western Railway Company to Condemn Certain Real Estate in Section 6, Township 14 North, of Range 18 East, in Fond du Lac County, Wisconsin, for Right of Way for Spur-track.

Know all men by these presents, That we, Union Lime Company as principal and Charles Weiler and Rufus C. Brown as sureties, are held and firmly bound unto Chicago & North Western Railway Company and Eden Independent Lime & Stone Company in the sum of Ten Thousand ($10,000.00) Dollars, to be paid to the said Chicago & North Western Railway Company and Eden Independent Lime & Stone Company, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of March, 1913.

14 Whereas, the above named Union Lime Company as plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Wisconsin.

Now, therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

UNION LIME COMPANY,
By CHARLES WEILER,
Treasurer,
CHARLES WEILER,
R. C. BROWN.

[CORPORATE SEAL.]

Attest:
R. C. BROWN, *Secretary*.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Charles Weiler and Rufus C. Brown being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Wisconsin, and know the contents of the foregoing in-

strument to which we have attached our names. We each for himself say we are worth the sum of Ten Thousand Dollars over and above all debts, liabilities and exemptions, in property within the state of Wisconsin.

CHARLES WEILER.
R. C. BROWN.

Subscribed to and sworn to before me this 18th day of
15 March, 1913.

W. C. LANTRY,
[NOTARIAL SEAL.] *Notary Public, Wisconsin.*

My commission expires Sep. 3, 1916.

Bond approved, and to operate as a supersedeas.
Dated March 26th, 1913.

JNO. B. WINSLOW,
Chief Justice, Supreme Court of Wisconsin.

[Seal Supreme Court of Wisconsin.]

16 [Endorsed:] State of Wisconsin. In Supreme Court. In the matter of the application of Chicago & Northwestern, etc., Chicago & Northwestern Ry. Co., Petitioner and Respondent, Eden Independent Lime & Stone Co., Intervenor and Respondent, v. Union Lime Company, Defendant and Appellant. Supersedeas bond. Filed Mar. 26, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis. Copy. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis.

17 SUPREME COURT,
State of Wisconsin, ss:

I, Clarence Kellogg, clerk of said court do hereby certify that there was lodged with me as such clerk on March 26th, 1913 in the matter of Chicago & Northwestern Railway Company, plaintiff against Union Lime Company and Eden Independent Lime & Stone Company defendants:

1. The original bond, a copy of which is herein set forth.
2. Three copies of the writ of error as herein set forth, one for each defendant and one to file at my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Madison, Wisconsin this 5th day of April, 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court.

[Endorsed:] Filed Apr. 5 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

18 Supreme Court of the United States.

UNION LIME COMPANY, Plaintiff in Error,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY and EDEN INDEPENDENT LIME & STONE COMPANY, Defendants in Error.

Præcipe.

To Clarence Kellogg, clerk of the Supreme Court of the State of Wisconsin:

The portions of the record in the above entitled case to be incorporated into the transcript of the record to be sent to the Clerk of the United States Supreme Court by virtue of a writ of error heretofore issued are indicated as follows:

1. Citation with proof and admission of service,
2. Writ of Error,
3. Clerk's return on Writ of Error,
4. Petition of Chicago & Northwestern Railway Company,
5. Answer of Union Lime Company,
6. Order Appointing Commissioners,
7. Order granting petition of Eden Independent Lime & Stone Company to intervene and become a party.
8. Petition, assignment of error, prayer for reversal and order granting writ of error.
9. Supersedeas bond on writ of error,
10. Clerk's certificate of transcript.

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Plaintiff in Error.

(*Endorsements.*)

EASTERN DISTRICT OF WISCONSIN, *ss:*

Served the within Præcipe on the within named Eden Independent Lime & Stone Company by delivering a true copy thereof to L. E. Lurvey, attorney of record for said company, on this 3rd day of April, A. D. 1913, at Fond du Lac.

(Signed) H. A. WEIL,
U. S. Marshal.

Marshal's Fees:

Service	$2.00
Travel	3.20
	$5.20

19 (Endorsements:) Supreme Court of United States. Union Lime Company, Plaintiff in Error, vs. Chicago & Northwestern Ry. Co. and Eden Independent Lime & Stone Company, Defendants in Error. Præcipe to Clerk of Wisconsin Supreme Court. Service admitted this 2nd day of April 1913. Edward M.

Smart, Attorneys for C. & N. W. Ry. Co. Original. Rec'd at Marshal's Office Apr. 2, 1913. Milwaukee, Wis. Filed Apr. 5, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis.

20 Pleas Before the Supreme Court of the State of Wisconsin at a Term Thereof Begun and Held at the Capitol in Madison, the Seat of Government of Said State, on the Second Tuesday, to wit, the Thirteenth Day of August, A. D. 1912.

Present: Hon. John B. Winslow, Chief Justice; Hon. Roujet D. Marshall, Hon. Robert G. Siebecker, Hon. James C. Kerwin, Hon. William H. Timlin, Hon. John Barnes, Hon. Aad John Vinje, Justices.

Clarence Kellogg, Clerk.

Be it remembered that heretofore, to-wit: on the twenty-first day of October in the year of Our Lord One Thousand Nine Hundred and twelve came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Union Lime Company, by its attorneys, and filed in said court its certain Notice of Appeal and Undertaking, according to the statute in such case made and provided, and also the return to such appeal, of the Clerk of the Circuit Court of Fond du Lac County, in said State, in words and figures following, that is to say:

21 STATE OF WISCONSIN,
Circuit Court, Fond du Lac County:

In the Matter of the Application of Chicago & Nothwestern Railway Company to Condemn Certain Real Estate in Section Six (6), Township Fourteen (14), North of Range Eighteen (18) East, in Fond du Lac County, Wisconsin, for Right of Way for Spur Track.

22 The petition of Chicago & Northwestern Railway Company respectfully shows:

That petitioner is a railroad corporation, duly incorporated, organized and existing under and in pursuance of the laws of the States of Wisconsin, Illinois and Michigan, and duly authorized to construct, operate and maintain the spur track hereinafter described.

That petitioner is the owner of, and is operating a system of railroads, with various lines of railroad in and through the States of Wisconsin, Illinois, Michigan, and other states, among which is a main line of railroad extending through sections five (5) and six (6) in township fourteen (14), north of range eighteen (18) east, Fond du Lac County, Wisconsin, and constituting a part of the railroad system of said petitioner.

That said railroad system and said main line are operated for the transportation of freight and passengers, and general railroad business.

That Nast Brothers Lime & Stone Company is now, and was at all the times herein alleged, a corporation organized under the laws of the State of Wisconsin, and the owner of, and engaged in the business of operating, stone quarries and lime works in the southeast quarter of section six (6) above described.

That Union Lime Company is now, and was at all the times herein alleged, a corporation organized under the laws of the State of Wisconsin, and the owner of, and engaged in the business of operating, stone quarries and lime works in said southeast quarter of section six (6) above described.

That for a number of years prior to the times herein alleged, your petitioner was, ever since has been, and now is the owner and in possession of, and engaged in operating, a spur track (together with branches, switches and sidings) with right of way therefor, which said spur track branched from and connected with your petitioner's main line in said section five (5) aforesaid, and ran on and partly through said southeast quarter of said section six (6), connecting with and serving the interests and business of the said companies aforesaid.

That the location of said spur, branches, switches and siding, together with the premises and properties of the said companies aforesaid, is correctly shown on the blue print map annexed to and made a part of this petition.

That Eden Independent Lime & Stone Company is a corporation organized under the laws of the State of Wisconsin, and was, prior to the commencement of the proceedings before the Railroad Commission of Wisconsin hereinafter alleged, the owner of certain premises, quarries, plants, buildings, lime kilns, etc., on the southwest quarter of said section six (6) aforesaid.

23 That prior to June 30, 1911, said Eden Independent Lime & Stone Company petitioned the Railway Commission of Wisconsin, in writing, praying, in substance, that the Chicago & Northwestern Railway Company, your petitioner herein, be ordered and required to construct a spur track westerly from the terminus of one of the tracks shown on the map hereto annexed to the plant and premises of said petitioner Company, and that a day be set for hearing on said petition, and that the officers of the Chicago & Northwestern Railway Company and of the Union Lime Company and Nast Brothers Lime & Stone Company, be cited to appear at said hearing; that a day for hearing was so fixed, and all of said companies were cited to and did appear, and thereafter, after full hearing on said petition in which all parties so cited to appear took part, the matter of said petition was submitted to said Commission for its determination.

That on the 30th day of June, 1911, in said proceeding, it was, by said Railroad Commission of Wisconsin, determined and ordered as follows:

1. That a spur track connecting, at its eastern terminus with the western terminus of said track designated on the annexed map as "Loading Track," and running thence westerly to the plant and premises of said Eden Independent Lime & Stone Company (as

marked in yellow upon the annexed map), is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime & Stone Company; that its construction and operation are not unusually unsafe or dangerous; that it is not unreasonably harmful to public interest.

2. That the Chicago & Northwestern Railway Company, your petitioner, construct a suitable sidetrack, as prayed for by said Eden Independent Lime & Stone Company, along the route so designated as aforesaid, which said sidetrack should be an extension of your petitioner's track, marked and designated on the annexed map as "Loading Track."

3. That said Eden Independent Lime & Stone Company perform and do certain things conditions precedent to the construction of said track.

Petitioner further alleges that said Eden Independent Lime & Stone Company has complied with the terms and conditions of said order, and your petitioner hereby pleads the said proceedings, and the said order and determination therein, and the conditions performed by said Eden Independent Lime & Stone Company, as the necessity for the taking and condemning of the property and premises herein sought to be taken and condemned.

That the spur track which petitioner desired to construct,
24 operate and maintain, will not alone or together with the track by which it will be connected with the main line, exceed five (5) miles in length from said main track of said petitioner's railroad.

That the real estate sought to be acquired by this proceeding for the extension, construction, operation and maintenance of said spur track is described as follows:

A strip of land thirty (30) feet in width, being fifteen (15) feet in width on each side of the center line, of the proposed track of the petitioner, as said center line is now located and staked out from the end of the present track of the petitioner, indicated on the blue print attached hereto as "Loading Track," to the west line of the southeast quarter of section six (6), in Township fourteen (14), north of range eighteen (18) east, in the County of Fond du Lac, and State of Wisconsin, a distance of one hundred seventy-five (175) feet measured along said center line; said center line intersecting the west line of the Southeast quarter of said section six (6), at a point seven hundred eight and three-tenths (708.3) feet north of the southwest corner of the southeast quarter of said section six (6).

Also, two (2) additional strips of land, one on each side of, adjoining and parallel with the strip of land above described, each twenty-five (25) feet in width, and both extending from said west line of the southeast quarter of said section six (6) easterly one hundred twenty-eight (128) feet measured along said center line.

That said real estate is owned and occupied by Union Lime Company.

That it is the intention of said corporation, the petitioner, in good

faith to use said real estate sought to be acquired in this proceeding, for the uses and purposes herein set forth.

That petitioner has actually surveyed its route over the land sought to be acquired for said spur track, and has actually staked out the center line of said proposed spur track.

That petitioner, said corporation, has annexed to this petition, a map showing the route of its track and the land desired to be taken for right of way therefor.

Wherefore, your petitioner prays that it may be determined herein that petitioner is entitled to take the whole of the land sought to be acquired and hereinbefore described for said purpose, and that commissioners of appraisal may be appointed, according to law, to ascertain and appraise the compensation to be made to the owners and persons interested in said real estate determined necessary to be taken for the purposes aforesaid, and that such proceedings may be taken, according to law, that your petitioner may acquire
25 said real estate for said purposes.

Dated September 7, 1912.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
By EDWARD M. SMART,
Its Attorney.

P. O. Address, Milwaukee, Milwaukee County, Wisconsin.

26 STATE OF WISCONSIN,
Milwaukee County, ss:

Edward M. Smart being first duly sworn, on oath, says that he is the attorney for the petitioner in the above entitled proceeding.

That he makes this verification for and on behalf of said petitioner and is authorized so to do.

That deponent has read the foregoing petition and knows the contents thereof; that all the material allegations of the same are within deponent's belief, and deponent verily believes the same to be true.

That the grounds of deponent's belief on the subject are the records and documents of petitioner relating to said matters in deponent's possession and conversation with the officers and agents of the petitioner.

That the reason why this verification is not made by the petitioner is that petitioner is a corporation and none of its officers reside in the county where deponent resides.

EDWARD M. SMART.

Subscribed and sworn to before me this 6th day of September 1912.

K. M. CROWLEY,
Notary Public for Wisconsin.

(Here follows blue print map marked p. 27.)

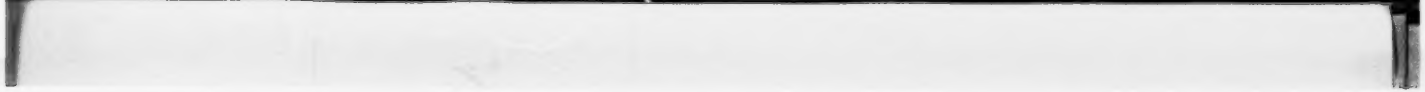
MAPS

TOO

LARGE

FOR

FILMING



28 (Endorsements:) Original. Circuit Court Fond du Lac County. In the Matter of the Application of the C. & N. W. Ry. Co., to condemn real estate in Fond du Lac County for spur track. Petition, Notice & Order. Edward M. Smart, Attorney for C. & N. W. Ry. Co., Wells Bldg., Milwaukee, Wis. Filed Circuit Court Fond du Lac, Wis. Wm. F. Sealy, Sept. 7, 1912. Filed Oct. 21, 1912, Clarence Kellogg, Clerk of Supreme Court, Wis.

29 STATE OF WISCONSIN,
Circuit Court, Fond Du Lac County:

In the Matter of the Application of Chicago & Northwestern Railway Company to Condemn Certain Real Estate in Section Six (6), Township Fourteen (14) North, of Range Eighteen (18) East, Fond Du Lac County, Wisconsin, for Right of Way for Spur Track.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Petitioner,
vs.
UNION LIME COMPANY, Defendant.

30 The above named defendant Union Lime Company, by Lines, Spooner, Ellis & Quarles, its attorneys, for answer to the petition of the above named petitioner respectfully shows to the Court:

1. This defendant admits the allegations contained in said petition.

2. Further answering this defendant alleges that the existing spur track together with the branches, switches and sidings thereto mentioned in said petition were constructed many years ago under and pursuant to agreements between the predecessor in title of said petitioner on the one part, and the predecessor in title of the Union Lime Company and the Nast Brothers Lime & Stone Company of the other part, and have since construction and hitherto been used in serving the plants and business of said last mentioned companies and no other plants or business, and that the plants of this defendant and of said Nast Brothers Lime & Stone Company have been constructed and arranged with reference to the use of and service afforded by said existing spur track and the branches, switches and sidings thereto.

3. Further answering this defendant alleges that the petition of the Eden Independent Lime & Stone Company to the Railroad Commission of Wisconsin mentioned in the petition herein, was filed with said Railroad Commission of Wisconsin on April 26, 1911. That said petition was so filed and the proceedings thereon before said Railroad Commission of Wisconsin were had and conducted and the order made by said Railroad Commission of Wisconsin in said proceedings requiring the said Chicago & Northwestern Railway Company to construct a sidetrack as prayed for by said Eden Independent Lime & Stone Company, which order is mentioned in the petition herein, was made and entered solely and exclusively under

and pursuant to the provisions of chapter 352 of the laws of Wisconsin for the year 1907 as amended by chapter 481 of the laws of Wisconsin for the year 1909 (the same now being sections 1797-11*m* and 1797-12*n* of the Wisconsin Statutes), and that said Railroad Commission of Wisconsin had no authority or power to receive and consider said petition or to entertain the said proceedings or to make or enter the said order, except as power so to do was and is conferred by said above mentioned statutes. That a copy of said order of said Railroad Commission of Wisconsin mentioned in the petition
31 herein is hereto annexed marked exhibit "A" and made part and parcel hereof.

4. Further answering defendant alleges that in its said petition to the Railroad Commission of Wisconsin said Eden Independent Lime & Stone Company alleged and set forth, as the fact is, that it was organized and exists as a corporation for the purpose of engaging in the business of operating stone quarries and lime works and manufacturing, selling and dealing in lime and other building material, and this defendant alleges that said Eden Independent Lime & Stone Company was so organized, as, ever has been and is a private corporation organized and existing solely for the pecuniary benefit and profit of its stockholders. That said proposed sidetrack will begin upon the land of this defendant and terminate upon the land of said Eden Independent Lime & Stone Company and throughout its course will extend and be laid entirely over and upon the lands of said Eden Independent Lime & Stone Company, and this defendant and will not be accessible at any point by or from any existing public highway and cannot be reached by the public generally or by anyone except said Eden Independent Lime & Stone Company and this defendant without crossing lands of either said Eden Independent Lime & Stone Company or this defendant.

5. Further answering this defendant alleges, especially sets forth and claims that the use for which petitioner seeks to take the lands of this defendant described in the petition herein, is a private and not a public use and that the taking of said lands for the uses and purposes set forth in the petition herein will deprive this defendant of its property without due process of law and deny to this
32 defendant the equal protection of the law contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

6. Further answering this defendant alleges, especially sets forth and claims that the said order of the Railroad Commission of Wisconsin mentioned in the petition herein and of which a copy is hereto annexed marked exhibit "A," requires said Chicago & Northwestern Railway Company to construct a sidetrack and acquire lands of this defendant therefor as stated in said order, for a private and not for a public use; that said Railroad Commission of Wisconsin had no power or authority to make said order; that the said order is null, void and of no effect, and does not constitute or establish in law the necessity for the taking and condemnation of the property and premises of this defendant herein sought to be taken and condemned by the petitioner, or that said property is sought to be taken for a

public use; and that the taking and condemnation of the lands of this defendant described in the petition herein under and pursuant to the said order of said Railroad Commission of Wisconsin will deprive this defendant of its property without due process of law, and deny to this defendant the equal protection of the law, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

7. This defendant further alleges, especially sets forth and claims that the said chapter 352 of the laws of Wisconsin for the year 1907 and the said chapter 481 of the laws of Wisconsin for the year 1909, otherwise known and designated as sections 1797-11*m* and 1797-12*n* of the Wisconsin Statutes, under and by virtue of which the aforesaid proceedings were had before said Railroad Commission
33 of Wisconsin resulting in the making and entering of the order of which a copy is hereto attached and marked exhibit "A" and under and by virtue of which the petitioner herein seeks in this proceeding to condemn and acquire the lands of this defendant described in the petition herein, are, and each of them is, unconstitutional, null and void for the reason that said statutes authorize the taking of private property for private use; and that the taking of defendant's land described in the petition herein, for the purpose and use set forth in the said petition, under and by virtue of the statutes aforesaid will deprive this defendant of its property without due process of law, and deny to this defendant the equal protection of the law contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

Wherefore, defendant prays that the petition herein may be dismissed with costs.

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Defendant.

34 STATE OF WISCONSIN,
Milwaukee County, ss:

O. W. Robertson being duly sworn, on oath, deposes and says that he is an officer of the above named defendant, Union Lime Company, to-wit: the president thereof, and makes this verification in its behalf, being duly authorized thereto; that he has read the foregoing answer and knows the contents thereof and that the same is true to his own knowledge; that the reason why this verification is made by affiant and not by said defendant is that said defendant is a corporation and affiant is an officer thereof, as herein above stated.

O. W. ROBERTSON.

Subscribed and sworn to before me this 27th day of September, 1912.

STELLA MATHE,
Notary Public, Wisconsin.

35 EXHIBIT "A."

It is therefore ordered, That the Chicago & Northwestern Railway Company construct a suitable sidetrack as prayed for by the petitioner herein, along the route designated by the blue print attached to the original petition, which sidetrack shall be an extension of the railway company's track marked "D" on said blue print.

It is further ordered, That the petitioner herein deposit with the Chicago & Northwestern Railway Company the sum of one
36 thousand six hundred and sixty dollars ($1,660) the estimated cost of the proposed extension, and in addition thereto the sum of two hundred dollars ($200) to cover the portion of the right of way which has to be acquired by condemnation or otherwise; and also give the railroad company a bond, to be approved by the Commission as to form, amount, and surety, securing the railroad against loss on account of any expense incurred beyond the amount of the deposit with the railroad.

Sixty days is deemed a reasonable period of time within which to comply with the provisions of this order. If for any valid reason compliance with the order can not be made within such time the Commission will extend the same upon application.

Dated this 30th day of June, 1911.

RAILROAD COMMISSION OF WISCONSIN,
By JOHN H. ROEMER,
HALFORD ERICKSON,
Commissioners.

37 (Endorsements:) Original. State of Wisconsin. Circuit Court Fond du Lac County, Wis. In the Matter of the Application of Chicago & Northwestern Railway Company to condemn certain real estate &c. Chicago & Northwestern Railway Co., Petitioner, vs. Union Lime Company, Defendant. Answer. Filed Circuit Court Sept. 28, 1912, Wm. F. Sealy. Fond du Lac, Wis. Filed Oct. 21, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis.

38 STATE OF WISCONSIN:

Circuit Court, Fond du Lac County.

In the Matter of the Application of CHICAGO & NORTHWESTERN RAILWAY COMPANY to Condemn Certain Real Estate in Section Six (6), Township Fourteen (14) North, of Range Eighteen (18) East, in Fond du Lac County, Wisconsin, for Right of Way for Spur Track.

Order Appointing Commissioners.

39 The above entitled proceeding having come on to be heard before said Court, upon the duly verified petition of Chicago

& Northwestern Railway Company, in pursuance of an order duly made by the Circuit Court for Fond du Lac County, on the 7th day of September, 1912, the date for hearing fixed in said order being September 21, 1912, and the same having been continued from said date by written stipulation of the parties on file herein, to September 28, 1912, and on said 28th day of September, 1912, the petition was heard.

The petitioner appearing by Edward M. Smart, its attorney, and Union Lime Company appearing by Lines, Spooner, Ellis & Quarles, its attorneys.

And it appearing that the duly verified petition of Chicago & Northwestern Railway Company was duly filed in the office of the Clerk of the Circuit Court for Fond du Lac County, on the 7th day of September, 1912, and that the notice prescribed by the order made by the Circuit Court on the said 7th day of September has been duly served upon the parties named in said petition, according to law, and proof of such service having been duly made and filed.

And neither party having offered any evidence, and the petitioner having moved the Court, upon the petition and the answer of the Union Lime Company for judgment as herein contained, and for an order as prayed for in the petition, and the said Court having heard the parties interested,

And it appearing to the satisfaction of the Court and the Court so finds,

That petitioner is a railroad corporation, duly incorporated, organized and existing under and in pursuance of the laws of the States of Wisconsin, Illinois and Michigan, and duly authorized to construct, operate and maintain the spur track hereinafter described.

That petitioner is the owner of, and is operating a system of railroads, with various lines of railroad in and through the
40 States of Wisconsin, Illinois, Michigan and other states, among which is a main line of railroad extending through sections five (5) and six (6) in township fourteen (14), north of range eighteen (18) east, Fond du Lac County, Wisconsin, and constituting a part of the railroad system of said petitioner.

That said railroad system and said main line are operated for the transportation of freight and passengers, and general railroad business.

That Nast Brothers Lime & Stone Company is now, and was at all the times herein alleged, a corporation organized under the laws of the State of Wisconsin, and the owner of, and engaged in the business of operating stone quarries and lime works in the southeast quarter of section six (6) above described.

That Union Lime Company is now, and was at all the times herein alleged, a corporation organized under the laws of the State of Wisconsin, and the owner of, and engaged in the business of operating, stone quarries and lime works in said southeast quarter of section six (6) above described.

That for a number of years prior to the times herein alleged, your petitioner was, ever since has been, and now is the owner and in possession of, and engaged in operating, a spur track (together

with branches, switches and sidings) with right of way therefor, which said spur track branched from and connected with your petitioner's main line in said section five (5) aforesaid, and ran on and partly through said southeast quarter of said section six (6), connecting with and serving the interests and business of the said companies aforesaid.

That the location of said spur, branches, switches and siding, together with the premises and properties of the said companies aforesaid, is correctly shown on the blue print map annexed to and made a part of the petition herein.

That Eden Independent Lime & Stone Company is a corporation organized under the laws of the State of Wisconsin, and was, prior to the commencement of the proceedings before the Railway Commission hereinafter alleged, the owner of certain premises, quarries, plants, buildings, lime kilns, etc., on the southwest quarter of said section six (6) aforesaid.

That prior to June 30, 1911, said Eden Independent Lime & Stone Company petitioned the Railroad Commission of Wisconsin, in writing, praying, in substance, that the Chicago & Northwestern Railway Company, the petitioner herein, be ordered and required to construct a spur track westerly from the terminus of one of the tracks shown on the map annexed to the petition, to the plant and premises of said petitioner Company, and that a day be set for hearing on said petition, and that the officers of the Chicago
41 & Northwestern Railway Company and of the Union Lime Company and Nast Brothers Lime & Stone Company, be cited to appear at said hearing; that a day for hearing was so fixed, and all of said companies were cited to and did appear, and thereafter, after full hearing on said petition, in which all parties so cited to appear took part, the matter of said petition was submitted to said Commission for its determination.

That on the 30th day of June, 1911, in said proceeding, it was, by said Railroad Commission of Wisconsin, determined and ordered as follows:

1. That a spur track connecting, at its eastern terminus with the western terminus of said track designated on the map annexed to the petition as "Loading Track," and running thence westerly to the plant and premises of said Eden Independent Lime & Stone Company (as marked in yellow on the map annexed to the petition), is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime & Stone Company; that its construction and operation are not unusually unsafe or dangerous; that it is not unreasonably harmful to public interest.

2. That the Chicago & Northwestern Railway Company construct a suitable sidetrack, as prayed for by said Eden Independent Lime & Stone Company, along the route so designated as aforesaid, which said sidetrack should be an extension of the track of Chicago & Northwestern Railway Company, marked and designated on the map annexed to the petition as "Loading Track."

3. That said Eden Independent Lime & Stone Company perform

and do certain things conditions precedent to the construction of said track.

That said Eden Independent Lime & Stone Company has complied with the terms and conditions of said order.

That it is necessary to take and condemn the property and premises herein described for the purposes set forth in the petition.

That the spur track which the petitioner desires to construct, operate and maintain, will not alone, or together with the track by which it will be connected with the main line, exceed five (5) miles in length from said main track of said petitioner's railroad.

That the real estate sought to be acquired by this proceed-
42 ing for the extension, construction, operation and maintenance of said spur track is described as follows:

A strip of land thirty (30) feet in width, being fifteen (15) feet in width on each side of the center line of the proposed track of the petitioner, as said center line is now located and staked out from the end of the present track of the petitioner, indicated on the blue print attached hereto as "loading track," to the west line of the southeast quarter of section six (6), in township fourteen (14), north of range eighteen (18) east, in the County of Fond du Lac, and State of Wisconsin, a distance of one hundred seventy-five (175) feet measured along said center line; said center line intersecting the west line of the southeast quarter of said section six (6) at a point seven hundred eight and three-tenths (708.3) feet north of the southwest corner of the southeast quarter of said section six (6).

Also, two (2) additional strips of land, one on each side of, adjoining and parallel with the strip of land above described, each twenty-five (25) feet in width, and both extending from said west line of the southeast quarter of said section six (6) easterly one hundred twenty-eight (128) feet measured along said center line.

That said real estate is owned and occupied by Union Lime Company.

That it is the intention of said corporation, the petitioner, in good faith to use said real estate sought to be acquired in this proceeding, for the uses and purposes herein set forth.

That the petitioner has actually surveyed its route over the land sought to be acquired for said spur track, and has actually staked out the center line of said proposed spur track.

That the petitioner, said corporation, has annexed to the petition herein, a map showing the route of its track and the land desired to be taken for right of way therefor.

That the existing spur track, together with the branches, switches and sidings, were constructed many years ago under and pursuant to agreement between the predecessor in title of the petitioner on the one part, and the predecessor in title of the Union Lime Company and Nast Brothers Lime & Stone Company of the other part, and have, since construction and hitherto, been used in serving the plants and business of said last mentioned companies, and no other plants or business, and that the plants of the Union Lime Company and the said Nast Brothers Lime & Stone Company have been constructed and arranged with reference to the use and service afforded

by said existing spur track and branches and switches and sidings thereto.

That the petition of the Eden Independent Lime & Stone Company to the Railroad Commission of Wisconsin, mentioned in the petition herein, was filed with said Railroad Commission of Wisconsin on April 26, 1911.

That the proceedings before the Railroad Commission referred to and described in the petition herein, and the order finally made and entered therein, were had, made and entered solely and exclusively under and pursuant to the provisions of chapter 352 of the laws of Wisconsin for the year 1907, as amended by chapter 481 of the laws of Wisconsin for the year 1909 (the same now being
43 sections 1797-11*m* and 1797-12*a* of the Wisconsin Statutes), and that said Railroad Commission of Wisconsin had no authority or power to receive and consider said petition, or to entertain the said proceedings, or to make or enter the said order, except as power so to do was and is conferred by said mentioned statutes.

That Exhibit "A," annexed to the answer of the Union Lime Company, is a copy of the order of the said Railroad Commission of Wisconsin, mentioned in the petition herein.

That the said Eden Independent Lime & Stone Company was organized and exists as a corporation for the purpose of engaging in the business of operating stone quarries and lime works and manufacturing, selling and dealing in lime and other building material, and was and is a private corporation organized and existing solely for the pecuniary benefit and profits of its stockholders.

That the proposed sidetrack will begin upon the land of the Union Lime Company and terminate upon the land of said Eden Independent Lime & Stone Company, and throughout its course will extend and will be laid entirely over and upon the lands of the said two companies, and will not be accessible at any point by or from any existing public highway, and cannot be reached by the public generally, or by any one except said Eden Independent Lime & Stone Company and the Union Lime Company, without crossing lands of either of said companies.

That the use for which said lands is sought to be taken and condemned is a public use, and that such taking will not deprive the Union Lime Company of its property without due process of law, or violate any provision of the Constitution of the United States or any amendment thereof.

That the statutes of the State of Wisconsin, hereinbefore referred to, are valid, and not violative of any provision of the United States Constitution, or any amendment thereof, or of the Constitution of the State of Wisconsin, or any amendment thereof, and the said Railroad Commission of Wisconsin had power and authority to entertain the said proceedings and make said order.

And no sufficient cause having been shown against granting the prayer of the petitioner, and upon motion of Edward M. Smart, attorney for the petitioner, it is hereby, by the Court,

Ordered, adjudged and determined, That all of the real estate

described in the petition herein, and sought to be acquired by this proceeding, and hereinbefore described in this order, is required for the purposes set forth in the petition herein, and is necessary and convenient for such purposes, and is necessary for public use.

It is further ordered, adjudged and determined, That said petitioner Chicago & Northwestern Railway Company is entitled to take the whole of the real estate described in said petition, and sought to be acquired in this proceeding, and hereinbefore described in
44 this order. It is further ordered, That Peter Schroten, Anton Leonard and E. C. Martin, who are three disinterested and competent freeholders and who reside in said Fond du Lac County, Wisconsin, be and they are hereby appointed commissioners to ascertain and appraise the compensation to be made to the owners and persons interested in the real estate by this order determined necessary to be taken, according to law.

It is further ordered, That the first meeting of said commissioners shall be on the 28th day of October, 1912, at ten o'clock in the forenoon of said day, at the office of the Clerk of the Circuit Court for Fond du Lac County, in the City of Fond du Lac, Fond du Lac County, Wisconsin.

It is further ordered, That said commissioners shall be entitled to ten dollars per day for each day actually and necessarily employed in the discharge of their duties as such commissioners, together with all necessary expenses incurred by them in the discharge of their duties, which shall be paid by Chicago & Northwestern Railway Company.

It is further ordered, That upon being requested in writing on behalf of the petitioner, Chicago & Northwestern Railway Company, or any person interested in any tract of land described in the petition, said commissioners shall proceed to perform their duties in respect to the real estate mentioned in such request, and shall cause to be given to each party interested, a notice of the time when, and the place where, they will meet to consider the amount of compensation to which the owners of the real estate described in the petition are entitled, which notice shall be personally served on each party or his authorized agent or attorney, or by leaving the same at his residence or place of business with a person of suitable age and discretion at least six days before the time of such meeting, and to the attorney or proper agent of the railroad corporation when requested to act by any other party. If any such party is a non-resident of this state, or his residence is unknown, and he has no authorized agent or attorney in this state, known to such commissioners, such notice shall be published in The Daily Commonwealth, a newspaper published in said Fond du Lac County, Wisconsin, once each week for two weeks preceding such meeting.

Dated September 28, 1912.

By the Court:

CHESTER A. FOWLER,
Circuit Judge.

45 (Endorsements:) Original. Circuit Court Fond du Lac County. In the Matter of the Application of C. & N. W. Ry. Co. to condemn real estate in Fond du Lac for spur track. Order appointing Commissioners. Edward M. Smart, Attorney for C. & N. W. Ry. Co., Wells Bldg., Milwaukee, Wis. Filed Circuit Court Oct. 10th, 1912. Wm. F. Sealy, Fond du Lac, Wis. Filed Oct. 21, 1912. Clarence Kellogg, Clerk Supreme Court, Wis.

46 And afterwards on the 13th day of December, A. D. 1912, the same being the Twenty-eighth day of said term, the following proceedings were had in said cause in this court:

Fond du Lac Circuit Court.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent,
vs.
UNION LIME COMPANY, Appellant.

And now at this day came the Eden Independent Lime Company, by its attorney, and moved the court now here for an order permitting said company to intervene as a party respondent herein, which motion having been argued by L. E. Lurvey, Esq., for the said Independent Lime & Stone Company, and by George Lines, Esq., for the said appellant and by Ralph W. Jackman, Esq., for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

47 And afterwards on the 7th day of January A. D. 1913, the same being the first day of said term, the following proceedings were had in said cause in this court:

Fond du Lac Circuit Court.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent,
vs.
UNION LIME COMPANY, Appellant.

The court being now sufficiently advised of and concerning the peti-on of the Eden Independent Lime & Stone Company for leave to intervene, &c., it is now here ordered that the said petitioner, Eden Independent Lime & Stone Company, be allowed to intervene and is hereby made party respondent herein, and that appellant serve its brief on said intervenor and that said intervenor be allowed to serve its brief in reply with the same effect as if the intervenor had been a party in the lower Court.

48 And afterwards on the 21st day of February, A. D. 1913, the same being the fourteenth day of said term, the following proceedings were had in said cause in this court:

Fond du Lac Circuit Court.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent,
vs.
UNION LIME COMPANY, Appellant; EDEN INDEPENDENT LIME & STONE COMPANY, Intervenor.

And now at this *dame* came the parties herein, by their attorneys, and this cause having been argued by L. E. Lurvey, Esq., attorney for said intervenor, and submitted for said appellant and respondent on case and briefs, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

49 And afterwards, to-wit: on the 11th day of March, A. D. 1913, the same being the sixteenth day of said term, the judgment of this court was rendered in words and figures following, that is to say:

In the Matter of the Application of Chicago & Northwestern Railway Company to Condemn Certain Real Estate in Section 6, Township 14 North, of Range 18 East in Fond du Lac County, Wisconsin for Right-of-Way for Spur Track.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Petitioner and Respondent; Eden Independent Lime & Stone Company, Intervenor and Respondent,

vs.

UNION LIME COMPANY, Defendant and Appellant.

Appeal from Circuit Court, Fond du Lac County, State of Wisconsin.

(*Opinion by Justice Siebecker.*)

This cause came on to be heard on appeal from the order of the Circuit Court of Fond du Lac County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Fond du Lac County, appealed from in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Thirty-six & 25/100 Dollars ($36.25).

50 Thereupon the opinion of the Court by Justice Siebecker was filed in words and figures following, that is to say:

51 No. 43.

STATE OF WISCONSIN,
In Supreme Court:

In the Matter of the Application of Chicago & Northwestern Railway Company to Condemn Certain Real Estate in Section 6, Township 14 North, of Range 18 East, in Fond du Lac County, Wisconsin for Right-of-Way for Spur Track.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Petitioner and Respondent; Eden Independent Lime & Stone Company, Intervenor and Respondent,

—

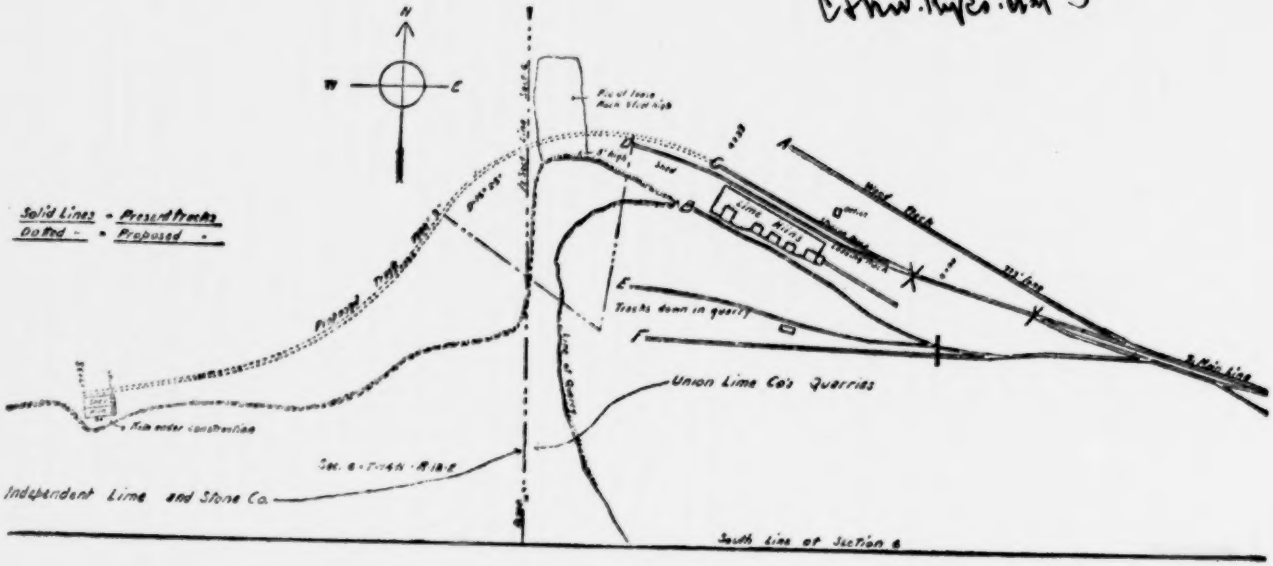
UNION LIME COMPANY, Appellant.

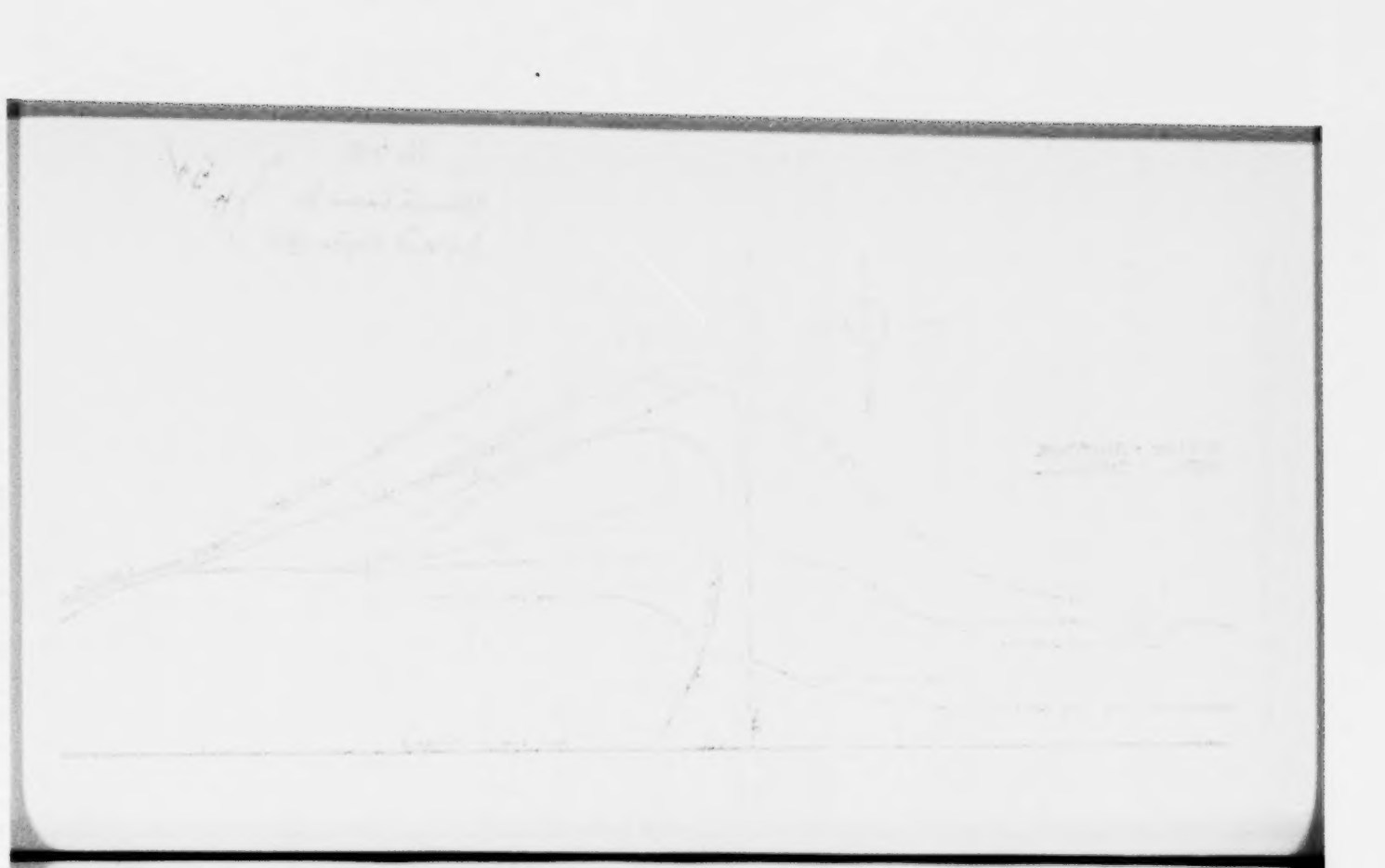
This is an appeal by the Union Lime Company from the order of the circuit court appointing commissioners to ascertain and appraise the compensation to be made to the owners of real estate which it is sought to take to build a spur track as part of the Chicago & Northwestern Railway Company's spur tracks at the place therein designated and described.

SIEBECKER, *J.* The Nast Bros. Lime & Stone Company and the Union Lime Company are engaged in operating stone quarries and limeworks in section 6, township 14 N., range 18 E., in Fond du Lac county. The Chicago & Northwestern Railway Company is the owner of and is operating a spur track, with branches, switches, and sidings from its main line, through section 5 of the town and range mentioned above. This spur track terminates where it serves the business and interests of the Union Lime Company. A map of the location of the properties of the parties and the existing railroad tracks is made a part of the record, and is as follows:

(Here follows diagram marked p. 52.)

No. 5 sq
Union Lime Co.
C & N.W. Ry Co. et al } p. 5 v.





53 The Eden Independent Lime & Stone Company is the owner of premises, quarries, plants, buildings, limekilns, etc., in section 6.

Some time prior to June 30, 1911, the Eden Independent Lime & Stone Company petitioned the Railroad Commission of Wisconsin that the railway company be ordered and required to construct a spur track to its premises from the terminus of the spur track on the premises of the Union Lime Company. The Commission made the following order upon the petition: "It is therefore ordered that the Chicago & Northwestern Railway Company construct a suitable side track as prayed for by the petitioner herein, along the route designated by the blue print attached to the original petition, which side track shall be an extension of the railway company's track marked 'D' on said blue print. It is further ordered that the petitioner herein deposit with the Chicago & Northwestern Railway Company the sum of one thousand six hundred and sixty dollars ($1,660), the estimated cost of the proposed extension, and, in addition thereto, the sum of two hundred dollars ($200) to cover the portion of the right of way which has to be acquired by condemnation or otherwise, and also give the railroad company a bond, to be approved by the Commission as to form, amount, and surety, securing the railroad against loss on account of any expense incurred beyond the amount of the deposit with the railroad. Sixty days is deemed a reasonable period of time within which to comply with the provisions of this order. If for any valid reason compliance with the order cannot be made within such time, the Commission will extend the same upon application." The railway company's application to the circuit court for condemnation of the real estate for the proposed spur track is based upon this order of the Railroad Commission. The land proposed to be taken belongs to the Union Lime Company, a party to the proceedings. For additional facts involved in the proceedings, reference is made to those set forth in the report of the case in this court of the Union Lime Company v. Railroad Commission, 144 Wis. 523, 129 N. W. 605.

The Eden Independent Lime & Stone Company, intervenor, asserts that the order appointing commissioners for condemnation of the lands specified in the petition, pursuant to the order of the railroad commission, is proper and valid. The appellant the Union Lime Company asserts the order is invalid and void, upon the ground that sections 1797-11m and 1797-12n, Stats., under which the order was made, are unconstitutional, for the reason that these statutes attempt to confer authority on the Railroad Commission to authorize the taking of appellant's property for a private use; and because the taking of appellant's land, under the petition of
54 the railway company herein, as ordered by the lower court, is for a private use, therefore denies the appellant the equal protection of the laws, and is contrary to the fourteenth amendment to the Constitution of the United States. The trial court held that the use for which appellant's land "is sought to be taken and condemned is a public use, and that such taking will not deprive the Union Lime Company of its property without due process of law, or

violate any provision of the Constitution of the United States or any amendment thereof." The court held that the statutes above referred to did not in any of their provisions conflict with the provisions of the United States or state Constitutions, and that the Railroad Commission of Wisconsin had power and authority to entertain the proceeding, and to make the order heretofore referred to.

The appellant on this appeal asserts no error save the contention that sections 1797-11m and 1797-12n, Stats., are void because they violate the provisions of the fourteenth amendment to the federal Constitution. In the case of Union Lime Co. v. Railroad Commission, 144 Wis. 523, 129 N. W. 605, this appellant raised the same question on the appeal to this court, in an action to set aside the Railroad Commission's order to have the appellant's property condemned for a spur track, and this court declared the statutes constitutional.

The railway company instituted this proceeding to condemn the appellant's property for railroad purposes, as directed in such order of the Railroad Commission. An examination of the questions as presented on this appeal discloses no new grounds or reasons which impeach the correctness of the conclusions announced in the decision on this question then before us, nor is anything submitted now which in our view suggests that these statutes conflict with any of the provisions of the United States or state Constitutions, or any amendment thereof. We do not deem it necessary in the instant case to repeat the considerations which form the basis of the decision in the former case, and it suffices to say that the questions presented on this appeal are ruled by that case, and hence the order appealed from must stand.

The order appealed from is affirmed.

55 STATE OF WISCONSIN,
In Supreme Court:

UNION LIME COMPANY, Plaintiff in Error,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY and EDEN INDEPENDENT LIME & STONE COMPANY, Defendant in Error.

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all that part of the record and proceedings indicated by præcipe now on file and of record in my office with all things concerning the same in the above entitled cause.

That the original writ of error, petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 18th day of April, A. D. 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No. 23,656. Wisconsin Supreme Court. Term No. 529. Union Lime Company, plaintiff in error, vs. The Chicago & Northwestern Railway Company and Eden Independent Lime & Stone Company. Filed April 26th, 1913. File No. 23,656.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 238

UNION LIME COMPANY,

Plaintiff in Error,

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE KEMP,

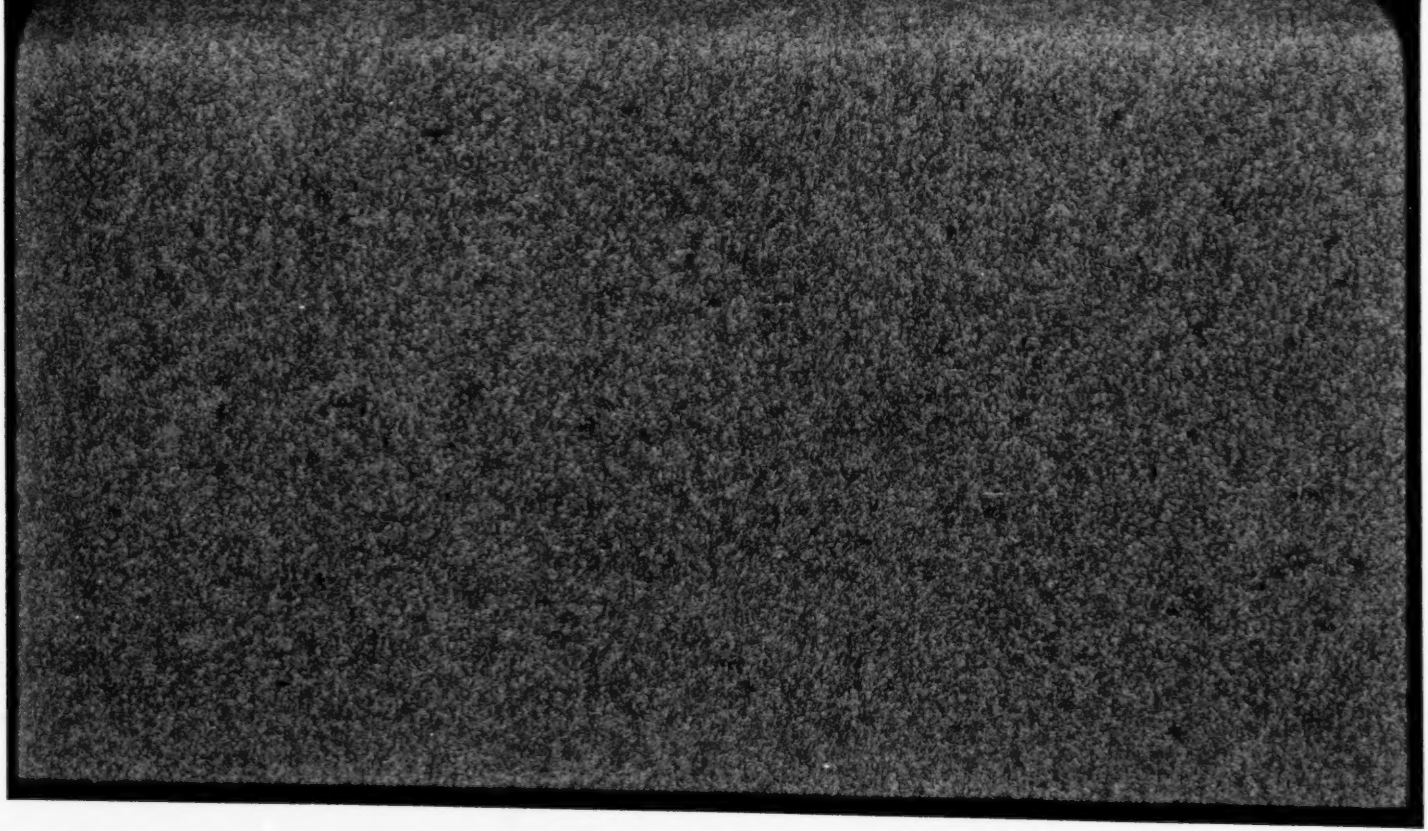
WILLIAM M. SPOONER,

FRANK O. BROWN,

Counsel for Plaintiff in Error,

LINES, SPOONER, BLAIR & QUARLES,

Attorneys for Plaintiff in Error.



Subject Index.

	Page
Appeal to Wisconsin Supreme Court	11
Argument	14
Circuit Court Proceedings—	
Petition	5
Answer	6
Findings	8
Judgment	10
Decision appealed from not binding on this court	26
Federal question is presented by the record	15
Findings of Fact show the taking for private use	39
Judgment appealed from is a final judgment	16
Jurisdiction of this court	15
Opinoin of Wisconsin Supreme Court	11
Private use, taking for, shown by findings	39
Proceedings before Railroad Commission—	
Petition	4
Order	5
Public use, meaning of	34
Public use, providing facilities for private business is not	26
Statement of the case	1-12
Statute authorizes taking for private use	16
Statute must itself show public use	20
Specification of Errors	12
Taking for private use shown by facts	39
Wisconsin Statutes—	
Section 1797-1 to 1797-38	2
Section 1797-3	2
Section 1797-11m	3
Section 1797-12n	4
Section 1802	2
Section 1831a	2

Index of Cases.

	Page
Apex Company v. Garbade, 32 Oregon, 582	36
Attorney General v. Eau Claire, 37 Wisconsin, 437	23
Bankhead v. Brown, 25 Iowa, 540	29, 30
Bridge Company v. Bridge Company, 138 U. S., 287	16
Chesapeake Company v. Moreland, 31 Kentucky Law Reporter, 1075	29
C. & N. W. Ry. Co. v. Union Lime Co., 152 Wisconsin, 633	11
Clark v. Nash, 198 U. S., 361	28, 29, 30, 32
Coal Company v. George's Creek Coal Company, 37 Maryland, 537	29, 30
Cole v. La Grange, 113 U. S., 1	15, 32
Davidson v. New Orleans, 96 U. S., 97	15
De Camp v. Railroad Company, 47 New Jersey Law, 43	28, 41
Donnelly v. Decker, 58 Wisconsin, 461	36
Eubank v. Richmond, 226 U. S., 137	15, 24
Fallbrook District v. Bradley, 164 U. S., 112	15, 28
Fleming v. Hull, 73 Iowa, 598	23, 36
Gifford Drainage District v. Shroer, 145 Indiana, 572	22
Gill v. Railroad Co., 76 Wisconsin, 293	16
Great Southern Company v. Jones, 193 U. S., 532	26
Hairston v. Railway Company, 208 U. S., 598	20, 27, 38, 41
Healty Lumber Company v. Morris, 33 Washington, 490	36
Huber v. Merkel, 117 Wisconsin, 355	36
Insurance Company v. Railway Company, 175 U. S., 91	15
Kaukauna Company v. Canal Company, 142 U. S., 254	32
Kipp v. Copper Company, 41 Montana, 509	29
Loan Association v. Topeka, 20 Wallace, 655	15, 32
Maginnis v. Ice Company, 112 Wisconsin, 385	36
Matter of Tuthill, 163 New York, 133	23, 36
Miller v. Railway Company, 34 Wisconsin, 533	16
Murray v. Hoboken Company, 18 Howard, 272	15
Nickey v. Stearns Company, 126 California, 150	22
Oil Company v. Hawkins, 30 Indiana Appeals, 557	36
Olcott v. Supervisors, 16 Wallace, 678	26
Pana v. Bowler, 107 U. S., 529	26
Phillips v. Watson, 63 Iowa 28	29
Phosphate Company v. Phosphate Company, 120 Tennessee (12 Cates) 260	36
Priewe v. Wisconsin Improvement Company, 93 Wisconsin, 534	36
Quarry Company v. Railway Company, 175 Indiana, 303	28
Railroad Company v. Gypsum Company, 154 Michigan, 290	36
Railroad Company v. Moss, 23 California, 323	28
Railroad Company v. Porter, 43 Minnesota, 527	28
Railroad Company v. Stock Yards Co., 212 U. S., 132	21

Page

Railroad Company v. Strange, 63 Wisconsin, 178 16
Railway Company v. Dix, 109 Illinois, 237 28
Railway Company v. Morehouse, 112 Wisconsin, 1 .....25, 28, 36, 37, 38, 39, 42
Railway Company v. Nebraska, 164 U. S., 403 ..... 15, 32
Railway Company v. Nebraska, 217 U. S., 196 ..... 15, 33
Railway Company v. Petty, 57 Arkansas, 359 28
Reeves v. Treasurer of Wood County, 8 Ohio State, 333 22
Ryerson v. Brown, 35 Michigan, 333 36
Scott v. McNeal, 154 U. S., 34 26
Security Company v. Lexington, 203 U. S., 323 21
State ex rel. Railway Company v. Railroad, 100 Wisconsin, 538 16
Strickley v. Mining Company, 200 U. S., 527 .....28, 29, 32
Theresa Drainage District, 90 Wisconsin, 304 24
Town of Venice v. Murdock, 92 U. S., 494 26
Ulmer v. Lime Rock Company, 98 Maine, 579 ..... 25, 28
Union Lime Company v. Railroad Commission, 144 Wisconsin, 523 .12, 24, 31, 36
Wallman v. R. Connor Company, 115 Wisconsin, 617 41
Water Company v. Judge, 133 Michigan, 48 36
Welton v. Dickson, 38 Nebraska, 767 36
Wilkinson v. Leland, 2 Peters, 627 15
Wisconsin Central Railway Company v. Cornell University, 49 Wisconsin, 162 16
Zircle v. Railway Company, 102 Virginia, 17 29

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 529.

UNION LIME COMPANY,

Plaintiff in Error,

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes to this court upon writ of error to review the decision and judgment of the supreme court of the state of Wisconsin affirming a judgment of the circuit court of Fond du Lac County in said state adjudging that the defendant in error, Chicago & Northwestern Railway Company, is entitled to take certain real estate belonging to the plaintiff in error for the purpose set forth in the petition of said Railway Company, to-wit: whereon to build a spur track to reach and serve the lime kilns of the defendant in error, Eden Independent Lime & Stone Company.

STATEMENT OF THE CASE.

For some years prior to 1907 the statutes of the state of Wisconsin contained the following, and no other provisions

relating specially to the construction of spur or switch tracks from railroads to reach private industries:

Section 1802. "The owner of any elevator, warehouse, manufacturing plant or mill, or of any lumber, coal or wood yard located within one-half mile of any railroad or any sidetrack thereof may, at his own expense construct a spur track from any such elevator, warehouse, manufacturing plant, mill or yard to a point on the right of way within the terminal or yard limits of any such railroad and the railroad shall connect the same with its tracks within such terminal or yard limits. * * * * such spur track shall at all times be under the control and management of and be kept in repair and operated for such owner or his assigns by such railroad, but the actual cost of so maintaining and operating shall be paid monthly by the owner thereof, and in case of neglect to so pay the same upon demand the obligation of this section upon any such railroad shall cease until such charges are paid. * * * *"

Section 1831a. "Every railway company existing in whole or in part under any law of this state and operating a railway therein may build, maintain and operate branches and spur tracks from its road or any branch thereof to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise, with all sidetracks, storage tracks, wyes, turnouts, and connections necessary or convenient to the use of the same; and every such company may acquire by purchase or condemnation in the manner provided in this chapter for the acquisition of real estate for railway purposes, other than for its main track, all necessary roadways and rights of way for such branches, spur tracks, sidetracks, storage tracks, wyes, turnouts, and connections; and every such company may also acquire, in the same manner, such depot grounds, yards, grounds for roundhouses, machine shops, warehouses, storehouses, elevators, docks, wharves and piers as may be necessary and convenient for the enjoyment and use of its road. * * *"

Sections 1797-1 to 1797-38 inclusive of the Wisconsin Statutes enacted in 1905 created a Railroad Commission with broad powers of control over the rates, regulations and service of railroads within the state and to compel the performance of all their public duties. Section 1797-3 provided among other things that "every railroad is hereby required to furnish reasonably adequate service and facilities," and other sections of the

act established suitable procedure and gave to the commission ample power by order to enforce this mandate of the statute.

In 1907 the state legislature without repealing or amending any of these statutes, all of which are still in effect, passed chapter 352 of the Laws of 1907 creating two new sections of the statutes to be known as sections 1797-11m and 1797-12n which, with amendments adopted in 1909 and 1911, but not here material, read as follows:

Section 1797-11m. 1. "Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain, and operate a reasonably adequate and suitable spur track, *whenever such spur track* does not necessarily exceed three miles in length, *is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise*, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest.

2. Such railroad may require the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of *acquiring, by condemnation or purchase, the necessary rights of way for such spur track*, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; provided however that when any such person, firm, corporation or association, shall be required by the commission to deposit with the railroad, the total estimated cost, as herein provided, such person, firm, corporation or association, may offer or cause to be offered, a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such railroad, and conditioned upon the construction of such spur track in a good and workmanlike maner, according to the plans and specifications provided by such railroad, and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and surety company bond shall be offered the person, firm, corporation or association primarily to be served thereby, shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further

that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation, or association primarily to be served thereby, shall give the railroad a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expense incurred beyond the amount so deposited with the railroad.

3. Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation, or association shall be required to pay to the person, firm, corporation, or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof, to be determined by the commission, upon such application and notice, to the persons, firms, corporations, or associations that have paid or contributed toward the original cost and expense of acquiring the right of way and constructing the same."

Section 1797-12n. "In case of the failure or refusal of any railroad to comply with any of the provisions of sections 1797-11m and 1797-12n, the person or persons, firm, corporation or association aggrieved thereby may file a complaint with the railroad commission setting forth the facts, and the said commission shall investigate and determine the matter in controversy, in accordance with the provisions of sections 1797-1 to 1797-38 inclusive, and any order it shall make in said proceeding shall have the same force and effect as an order in any other proceeding properly begun under and by virtue of the provisions of said sections."

On April 26, 1911, these statutes being in force the defendant in error, Eden Independent Lime & Stone Company, filed a petition with the Railroad Commission of Wisconsin under section 1797-12n praying that the defendant in error, Chicago & Northwestern Railway Company, be ordered and required to construct a spur track westerly from the terminus of one of the tracks shown on a map annexed to the petition to the plant and premises of said petitioner company. (Transcript 10 and 18.) A substantial copy of this map is contained in

the transcript on which the proposed new track is marked in yellow.

Such proceedings were had before the Railroad Commission that on June 30, 1911, that body made the following order:

"It is therefore ordered, That the Chicago & Northwestern Railway Company construct a suitable sidetrack as prayed for by the petitioner herein, along the route designated by the blue print attached to the original petition, which sidetrack shall be an extension of the railway company's track marked 'D' on said blue print.

"It is further ordered, That the petitioner herein deposit with the Chicago & Northwestern Railway Company the sum of one thousand six hundred and sixty dollars ($1,660) the estimated cost of the proposed extension, and in addition thereto the sum of two hundred dollars ($200) *to cover the portion of the right of way which has to be acquired by condemnation or otherwise;* and also give the railroad company a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expense incurred beyond the amount of the deposit with the railroad.

"Sixty days is deemed a reasonable period of time within which to comply with the provisions of this order. If for any valid reason compliance with the order cannot be made within such time the commission will extend the same upon application." (Transcript 16.)

Thereafter and on September 7, 1912, the defendant in error, Chicago & Northwestern Railway Company, filed its petition in the circuit court of Fond du Lac County, Wisconsin, praying that it might be determined that it was entitled to take certain lands of the plaintiff in error therein described for the purpose of constructing said spur or switch track as ordered by the Railroad Commission.

In addition to describing the property sought to be taken and alleging other matters not here material, the petition of the railway company set forth the application of the Eden Company to the Railroad Commission and the proceedings before that body, and thereupon averred:

"That on the 30th day of June, 1911, in said proceeding, it was, by said Railroad Commission of Wisconsin, determined and ordered as follows:

"1. That a spur track connecting, at its eastern terminus with the western terminus of said track designated on the annexed map as 'Loading Track,' and running thence westerly to the plant and premises of said Eden Independent Lime & Stone Company (as marked in yellow upon the annexed map), *is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime & Stone Company;* that its construction and operation are not unusually unsafe or dangerous; that it is not unreasonably harmful to public interest.

"2. That the Chicago & Northwestern Railway Company, your petitioner, construct a suitable sidetrack, as prayed for by said Eden Independent Lime & Stone Company, along the route so designated as aforesaid, which said sidetrack should be an extension of your petitioner's track, marked and designated on the annexed map as 'Loading Track.'

"3. That said Eden Independent Lime & Stone Company perform and do certain things conditions precedent to the construction of said track.

"Petitioner further alleges that said Eden Independent Lime & Stone Company has complied with the terms and conditions of said order, and *your petitioner hereby pleads the said proceedings, and the said order and determination therein, and the conditions performed by said Eden Independent Lime & Stone Company, as the necessity for the taking and condemning of the property and premises herein sought to be taken and condemned.*" (Transcript 10-11.)

There was no other allegation in the petition of the use or purpose for which condemnation of the land was sought or of right to condemn, and no allegation that it was required for or intended to be used for general railway purposes or other public use, but it was alleged:

"That it is the intention of said corporation, the petitioner, in good faith, to use said real estate sought to be acquired in this proceeding for the uses and purposes herein set forth." (Transcript 11-12.)

In its answer to the Railway Company's petition the plaintiff in error admitted all the facts alleged therein.

It further alleged that the existing spur track with its branches, switches and sidings were constructed many years ago under agreements between the predecessor in title of the petitioning Railway Company and the predecessor in title of

plaintiff in error and an adjacent land owner, the Nast Brothers Lime & Stone Company, "and have since construction and hitherto been used in serving the plants and business of said last mentioned companies and no other plants or business, and that the plants of this defendant and of said Nast Brothers Lime & Stone Company have been constructed and arranged with reference to the use of and service afforded by said existing spur track and the branches, switches and sidings thereto." (Transcript 13.)

It further alleged that the petition of the Eden Company to the Railroad Commission was filed April 26, 1911; that it was so filed and the proceedings thereon were had and the order of the commission made "solely and exclusively under and pursuant to the provisions of" sections 1797-11m and 1797-12n, above quoted, "and that said Railroad Commission of Wisconsin had no authority or power to receive and consider said petition or to entertain the said proceedings or to make or enter the said order, except as power so to do was and is conferred by said above mentioned statutes." (Transcript 13-14.)

The answer of plaintiff in error further alleged that the Eden Company was a private corporation existing solely for pecuniary profit of its stockholders; that the proposed sidetrack will begin upon land of the plaintiff in error and terminate upon land of the Eden Company, and throughout its course extend and be laid entirely over and upon lands of the Eden Company and plaintiff in error and not be accessible at any point by or from any existing public highway or accessible by the public generally or by any one except said Eden Company and plaintiff in error without crossing lands of one or the other of them. (Transcript 14.)

The answer further alleged that the use for which the lands were sought to be taken was a private and not a public use; that such taking, the said order of the Railroad Commission requiring the construction of the said sidetrack and the acquisition of lands therefor and the above quoted statutes pursuant to which said order was made would deprive plaintiff in error of

its property without due process of law and deny to it the equal protection of the laws contrary to the provisions of the fourteenth amendment to the constitution of the United States. (Transcript 14-15.)

When the case came on for hearing before the circuit court of Fond du Lac County neither party offered any evidence, but the petitioning Railway Company moved the court for judgment upon the pleadings (Transcript 17), thus admitting all the facts alleged in the answer of plaintiff in error. This motion was granted and thereupon the court entered an order, which under the Wisconsin practice has the force of a judgment, and in which by way of recital and in the nature of findings of fact and conclusions of law the court restated substantially all of the allegations of fact in both petition and answer and its legal conclusions therefrom. Of the findings so made, the following are material to the present controversy:

FIRST. "That prior to June 30, 1911, said Eden Independent Lime & Stone Company petitioned the Railroad Commission of Wisconsin, in writing, praying, in substance, that the Chicago & Northwestern Railway Company, the petitioner herein, be ordered and required to construct a spur track westerly from the terminus of one of the tracks shown on the map annexed to the petition, to the plant and premises of said petitioner company, and that a day be set for hearing on said petition, and that the officers of the Chicago & Northwestern Railway Company and of the Union Lime Company and Nast Brothers Lime & Stone Company, be cited to appear at said hearing; that a day for hearing was so fixed, and that all of said companies were cited to and did appear, and thereafter, after full hearing on said petition, in which all parties so cited to appear took part, the matter of said petition was submitted to said Commission for its determination." (Transcript 18.) The Eden Company's petition was filed April 26, 1911. (Transcript 20.)

SECOND. "That on the 30th day of June, 1911, in said proceeding, it was, by said Railroad Commission of Wisconsin, determined and ordered as follows:

"1. That a spur track connecting, at its eastern terminus with the western terminus of said track designated on the map annexed to the petition as 'Loading Track,' and running thence westerly to the plant and premises of said Eden Independent Lime & Stone Company (as marked in yellow on the map an-

nexed to the petition), *is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime & Stone Company;* that its construction and operation are not unusually unsafe or dangerous; that it is not unreasonably harmful to public interest.

"2. That the Chicago & Northwestern Railway Company construct a suitable sidetrack, as prayed for by said Eden Independent Lime & Stone Company, along the route so designated as aforesaid, which said sidetrack should be an extension of the track of Chicago & Northwestern Railway Company, marked and designated on the map annexed to the petition as 'Loading Track.'

"3. That said Eden Independent Lime & Stone Company perform and do certain things conditions precedent to the construction of said track." (Transcript 18-19.) A copy of the order of the Railroad Commission is printed *supra*, p. 5.

THIRD. "That said Eden Independent Lime & Stone Company has complied with the terms and conditions of said order." (Transcript 19.)

FOURTH. "That it is necessary to take and condemn the property and premises herein described for the purposes set forth in the petition." (Transcript 19.)

FIFTH. "That it is the intention of said corporation, the petitioner, in good faith to use said real estate sought to be acquired in this proceeding, for the uses and purposes herein set forth." (Transcript 19.)

SIXTH. "That the existing spur track, together with the branches, switches and sidings, were constructed many years ago under and pursuant to agreement between the predecessor in title of the petitioner on the one part, and the predecessor in title of the Union Lime Company and Nast Brothers Lime & Stone Company of the other part, and have since construction and hitherto, been used in serving the plants and business of said last mentioned companies, and no other plants or business, and that the plants of the Union Lime Company and the said Nast Brothers Lime & Stone Company have been constructed and arranged with reference to the use and service afforded by said existing spur track and branches and switches and sidings thereto." (Transcript 19-20.)

SEVENTH. "That the proceedings before the Railroad Commission referred to and described in the petition herein, and the order finally made and entered therein, were had, made and entered solely and exclusively under and pursuant to the provisions of chapter 352 of the laws of Wisconsin for the year 1907, as amended by chapter 481 of the laws of Wisconsin for the year 1909 (the same now being sections 1797-11m and

1797-12n of the Wisconsin Statutes), and that said Railroad Commission of Wisconsin had no authority or power to receive and consider said petition, or to entertain the said proceedings, or to make or enter the said order, except as power so to do was and is conferred by said mentioned statutes." (Transcript 20.)

EIGHTH. "That the said Eden Independent Lime & Stone Company was organized and exists as a corporation for the purpose of engaging in the business of operating stone quarries and lime works and manufacturing, selling and dealing in lime and other building material, and was and is a private corporation organized and existing solely for the pecuniary benefit and profit of its stockholders." (Transcript 20.)

NINTH. "That the proposed sidetrack will begin upon the land of the Union Lime Company and terminate upon the land of said Eden Independent Lime & Stone Company, and throughout its course will extend and will be laid entirely over and upon the lands of the said two companies, and will not be accessible at any point by or from any existing public highway, and cannot be reached by the public generally, or by any one except said Eden Independent Lime & Stone Company and the Union Lime Company, without crossing lands of either of said companies." (Transcript 20.)

TENTH. "That the use for which said land is sought to be taken and condemned is a public use, and that such taking will not deprive the Union Lime Company of its property without due process of law, or violate any provision of the Constitution of the United States or any amendment thereof." (Transcript 20.)

ELEVENTH. "That the statutes of the state of Wisconsin, hereinbefore referred to, are valid, and not violative of any provision of the United States Constitution, or any amendment thereof, or of the Constitution of the state of Wisconsin, or any amendment thereof, and the said Railroad Commission of Wisconsin had power and authority to entertain the said proceedings and make said order." (Transcript 20.)

The material parts of the order or judgment of the circuit court based upon the foregoing findings, which, as before said, were incorporated therein by way of recital, are as follows:

"Ordered, adjudged and determined, That all of the real estate described in the petition herein, and sought to be acquired by this proceeding, and hereinbefore described in this order, is required for the purposes set forth in the petition herein, and is necessary and convenient for such purposes, and is necessary for public use.

"It is further ordered, adjudged and determined, That said petitioner Chicago & Northwestern Railway Company is entitled to take the whole of the real estate described in said petition, and sought to be acquired in this proceeding, and hereinbefore described in this order." (Transcript 20-1.)

In the order the court also appointed three commissioners to appraise the compensation to be made for the land taken.

From this order or judgment the plaintiff in error appealed to the supreme court of Wisconsin, and after the cause reached that court the defendant in error Eden Company on its own application was allowed to intervene.

The state supreme court affirmed the judgment of the circuit court and in its opinion (filed March 11, 1913, and reported in 152 Wis., 633, as C. & N. W. Ry. Co. v. Union Lime Co.) said:

"The Eden Independent Lime & Stone Company, intervenor, asserts that the order appointing commissioners for condemnation of the lands specified in the petition, pursuant to the order of the Railroad Commission, is proper and valid. The appellant the Union Lime Company asserts the order is invalid and void, upon the ground that sections 1797-11m and 1797-12n, Statutes, under which the order was made, are unconstitutional, for the reason that these statutes attempt to confer authority on the Railroad Commission to authorize the taking of appellant's property for a private use; and because the taking of appellant's land, under the petition of the railway company herein, as ordered by the lower court, is for a private use, therefore denies the appellant the equal protection of the laws, and is contrary to the 14th amendment to the constitution of the United States. The trial court held that the use for which appellant's land 'is sought to be taken and condemned is a public use, and that such taking will not deprive the Union Lime Company of its property without due process of law, or violate any provision of the constitution of the United States or any amendment thereof.' The court held that the statutes above referred to did not in any of their provisions conflict with the provisions of the United States or state constitutions, and that the Railroad Commission of Wisconsin had power and authority to entertain the proceeding, and to make the order heretofore referred to.

"The appellant on this appeal asserts no error save the contention that sections 1797-11m and 1797-12n, Statutes, are void because they violate the provisions of the 14th amendment to

the federal constitution. In the case of *Union Lime Co. v. Railroad Commission*, 144 Wis., 523, 129 N. W., 605, this appellant raised the same question on the appeal to this court, in an action to set aside the Railroad Commission's order to have the appellant's property condemned for a spur track, and this court declared the statutes constitutional.

The railway company instituted this proceeding to condemn the appellant's property for railroad purposes, as directed in such order of the Railroad Commission. An examination of the questions as presented on this appeal discloses no new grounds or reasons which impeach the correctness of the conclusions announced in the decision on this question then before us, nor is anything submitted now which in our view suggests that these statutes conflict with any of the provisions of the United States or state constitutions, or any amendment thereof. We do not deem it necessary in the instant case to repeat the considerations which form the basis of the decision in the former case, and it suffices to say that the questions presented on this appeal are ruled by that case, and hence the order appealed from must stand." (Transcript 25-6.)

In accordance with the views thus expressed in its opinion the supreme court of Wisconsin on March 11, 1913, affirmed the order or judgment of the circuit court and it is to review this judgment of the supreme court that this writ of error has been sued out.

SPECIFICATIONS OF ERROR.

1. The supreme court of Wisconsin erred in holding and deciding that sections 1797-11m and 1797-12n of the Wisconsin Statutes, the same being chapter 352 of the Laws of Wisconsin for the year 1907 as amended by chapter 481 Laws of Wisconsin for the year 1909, do not contravene and are not in conflict with the provisions of the 14th amendment to the constitution of the United States.

2. The supreme court of Wisconsin erred in holding and deciding that proceedings had under said sections 1797-11m and 1797-12n of the Wisconsin Statutes and the taking of property in such proceedings for the purpose specified in said sections, do not take private property for private use contrary to the provisions of the 14th amendment to the constitution of the United States.

3. The supreme court of Wisconsin erred in holding and deciding that the order or judgment of the circuit court of Fond du Lac County, Wisconsin, and the decision and judgment of the supreme court of the state of Wisconsin herein do not take the property of the plaintiff in error for a private use.

4. The supreme court of Wisconsin erred in holding and deciding that the said judgment of the circuit court of Fond du Lac County, Wisconsin, and the said decision and judgment of the said supreme court of Wisconsin do not deprive the plaintiff in error of its property without due process of law, contrary to the provisions of the 14th amendment to the constitution of the United States.

5. The supreme court of Wisconsin erred in holding and deciding that the said order or judgment of the circuit court of Fond du Lac County, Wisconsin, and the said decision and judgment of the said supreme court of Wisconsin do not deny to the plaintiff in error the equal protection of the laws contrary to the provisions of the 14th amendment to the constitution of the United States.

6. The supreme court of Wisconsin erred in holding and deciding that the order of the Railroad Commission of Wisconsin made and entered under and pursuant to said sections 1797-11m and 1797-12n of the Wisconsin Statutes requiring the defendant in error, Chicago & Northwestern Railway Company, to acquire the lands of plaintiff in error for the purpose specified in said order is valid and does not contravene or conflict with the provisions of the 14th amendment to the constitution of the United States.

7. The supreme court of Wisconsin erred in holding and deciding that the taking of the property of plaintiff in error under and pursuant to the aforesaid order of the Railroad Commission of Wisconsin for the purpose specified in said order is not a taking of the property of plaintiff in error for a private use and does not deprive the plaintiff in error of its property without due process of law.

8. The supreme court of Wisconsin erred in holding and deciding that the taking of lands of the plaintiff in error for the purpose of constructing thereon a spur track to reach the plant of the defendant in error, Eden Independent Lime & Stone Company, because such track is practically indispensable to the successful operation of said plant, does not take the property of the plaintiff in error for a private use and without due process of law and is not in violation of the provisions of the 14th amendment to the constitution of the United States.

9. The supreme court of Wisconsin erred in affirming the order or judgment of the circuit court of Fond du Lac County, Wisconsin, in this case.

10. The supreme court of Wisconsin and the circuit court of Fond du Lac County erred in holding and deciding that upon the facts appearing in the record herein and found by the said circuit court of Fond du Lac County the taking of the lands of plaintiff in error for the purpose set forth in the petition of the defendant in error, Chicago & Northwestern Railway Company, will not deprive plaintiff in error of its property without due process of law.

11. The supreme court of Wisconsin and the circuit court of Fond du Lac County, Wisconsin, erred in holding and deciding upon the facts appearing in the record herein and found by the said circuit court, that the judgments of the said circuit court and of said supreme court do not take the lands of plaintiff in error for a private use.

ARGUMENT.

Aside from the question of the jurisdiction of this court but a single question is presented by the record herein. That question is whether the judgment of the supreme court of Wisconsin and the judgment of the circuit court of Fond du Lac County, thereby affirmed take the property of plaintiff in error for a private instead of a public use and therefore deprive plaintiff in error of its property without due process of law and deny to it the equal protection of the laws, contrary to the provisions of the 14th amendment to the constitution of the United States.

It is the contention of plaintiff in error that this is so because (a) the statute under which the proceedings here involved were had itself provides for the taking of private property for private use; and (b) that the facts appearing in the record and found by the circuit court show that the use for which it is sought to take the lands of plaintiff in error in this proceeding is a private and not a public one.

I.

JURISDICTION OF THIS COURT.

1. *The record presents a federal question.*

The taking by a state of the private property of one person or corporation without the owner's consent for the private use of another under the power of eminent domain, or of taxation, or the police power, or any other power, is not due process of law, and is a violation of the 14th amendment of the constitution of the United States.

Wilkinson v. Leland, 2 Peters, 627, 658.

Murray v. Hoboken Co., 18 How., 272, 276.

Loan Assn. v. Topeka, 20 Wall., 655.

Davidson v. New Orleans, 96 U. S., 97-102.

Cole v. La Grange, 113 U. S., 1.

Fallbrook Dist. v. Bradley, 164 U. S., 112, 158, 161.

Railway Co. v. Nebraska, 164 U. S., 403, 417.

Insurance Co. v. Railway Co., 175 U. S., 91.

Railway Co. v. Nebraska, 217 U. S., 196.

Embank v. Richmond, 226 U. S., 137.

Wactor & Shuming & 196 U. S. 239, 251

In its answer to the petition of the railroad company in the circuit court of Fond du Lac County (Transcript 13-15) plaintiff in error specifically set forth and claimed that the statute here in question violates the 14th amendment in this respect. The decisions of both the circuit court and supreme court of Wisconsin were in favor of the validity of the statute and the case was decided in both courts adversely to the plaintiff in error solely upon this ground.

2. *The judgment brought up for review by the writ of error is a final judgment.*

Under the statutes of Wisconsin and the practice prevailing in that state a proceeding by a railroad company to condemn lands for its use is a special proceeding and the order in such a proceeding determining that the petitioning railroad company has the right to take the lands sought to be taken is a final order having the force of a judgment from which an appeal may be taken to the state supreme court.

Wisconsin Central Railway Company v. Cornell University, 49 Wisconsin, 162.

Railroad Company v. Strange, 63 Wisconsin, 178.

Gill v. Railroad Company, 76 Wisconsin, 293.

State ex rel. Railway Company v. Railroad Company, 100 Wisconsin, 538.

And the order of the circuit court determining the right of the railway to take is final and conclusive upon that question unless appealed from.

Miller v. Railway Company, 34 Wisconsin, 533.

Inasmuch therefore as the state supreme court regards the order of the circuit court as final unless appealed from, upon the question of the right to condemn, this court will also treat it in the same light for the purpose of exercising its appellate jurisdiction.

Bridge Company v. Bridge Company, 138 U. S., 287.

It is clear therefore that this court has jurisdiction of this cause under section 237 of the judicial code.

II.

THE WISCONSIN STATUTE (CHAPTER 352 LAWS OF 1907, NOW SECTIONS 1797-11m AND 1797-12n WISCONSIN STATUTES) IS UNCONSTITUTIONAL BECAUSE IT AUTHORIZES THE TAKING OF PRIVATE PROPERTY FOR PRIVATE USE.

The vital part of this statute is subsection 1 of section 1797-11m, which reads:

"Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain, and operate a reasonably adequate and suitable spur track, *whenever such spur track* does not necessarily exceed three miles in length, *is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise*, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest."

Subsection 2 of section 1797-11m requires the industry or enterprise "primarily to be served" to pay the cost of acquiring, "by condemnation or purchase" the necessary right of way and constructing the spur track, and prescribes the procedure to be followed in ascertaining and securing payment of the same.

Subsection 3 of the same section prescribes the terms upon which other parties may connect with and use such spur track and requires such others

"to pay to the person, firm, corporation or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track and of constructing the same an equitable proportion thereof."

Section 1797-12n provides that in case any railroad refuses to comply with the provisions of section 1797-11m it may be compelled to do so upon application to the railroad commission by "the person or persons, firm, corporation or association aggrieved thereby."

The first subsection of section 1797-11m contains all of the substantive provisions of the law, all of those which declare the right of an industry or enterprise to have a spur track constructed and maintained by a railroad and the duty of the railroad to construct and maintain the same. All the other portions of the statute merely prescribe details for the enforcement of this right and duty.

By subsection 1 of section 1797-11m above quoted, every railroad is in mandatory terms required to acquire the neces-

sary right of way for and to construct, maintain and operate a spur track whenever:

1. Such spur track is practically indispensable to the successful operation of any existing or proposed mill, elevator, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise;

2. Such spur track will not necessarily exceed three miles in length;

3. Its construction and operation will not be unusually unsafe and dangerous; and,

4. Will not be unreasonably harmful to public interest.

In this connection we need not consider the provisions of this statute requiring construction of a spur track only in case it does not exceed three miles in length, is not unusually unsafe and dangerous and is not unreasonably harmful to public interest.

These are negative requirements in the nature of limitations, subject to which the duty of the railroad and the right of the industry are to be absolute. Subject only to these limitations, the duty of the railroad to construct, maintain and operate a spur track, and the right of any industry or enterprise to have one constructed, maintained and operated are by the statute made to depend only upon the necessity for such spur track to the industry or enterprise. When this necessity exists, no matter what may be the character or magnitude of the industry or enterprise, the duty of the railroad company arises. To perform this duty subsection 2 of section 1797-11m inferentially grants to the railroad the power of eminent domain to obtain the necessary ight of way, and the supreme court of Wisconsin in upholding the statute has affirmed this grant as valid.

By its terms this statute is not limited in its operation to the construction of spur tracks by railroads when necessary for the discharge of their duty as public carriers, nor to cases where such tracks will be of public use. No such test of the duty to build or the right to demand is imposed, and no such

inquiry is required to be made by the railroad commission or by the court in proceedings under it. Instead the mandate of the statute becomes effective if a spur track "is practically indispensable to the successful operation of any existing or proposed * * * * industry or enterprise." The statutory criterion is not whether the track is needed for public use, but whether it is indispensable for the conduct of private business.

Neither is there in the statute any declaration that a spur track constructed under it shall be open to use by the public or that it shall be operated for any purpose except to serve the industry or enterprise for whose successful operation it is practically indispensable. In section 1797-12n there is a provision authorizing connections to be made with such a spur track, but those making such connections are required to pay a proportionate part of the cost of the original construction, so that upon the face of the statute itself the use of the spur track in the manner and upon the terms that railroad tracks are used is not open to the public but only those who may have contributed to the cost of construction are entitled to make use of the facilities afforded. This provision seems to deny the right of use by the public generally. It is we think therefore apparent that the constitutional validity of this statute must rest upon the proposition that the taking of private land for the purpose of right of way for a spur track "practically indispensable to the successful operation of any existing or proposed * * * * industry or enterprise," of whatever character or size, is a taking for public use and therefore within the power of eminent domain.

We do not contend that because a spur track may be of special benefit to a particular industry or because an industry specially benefitted may bear a part or the whole of the cost of construction, such spur track is necessarily for private use and the power of eminent domain cannot be exercised to procure right of way therefor. Nor do we contend that this statute is invalid merely because it gives to those controlling an industry or enterprise power to compel a railroad company to build a spur track and if necessary exercise the power of eminent domain to obtain right of way therefor, thus in sub-

stance though not in form granting the power of eminent domain to private parties.

Our contention is that in not only authorizing but commanding the taking of one person's property at the demand of another merely because such taking is practically indispensable to the successful conduct of that other's private business, the statute prescribes an illicit basis for the exercise of the power of eminent domain or any other governmental power.

We further contend that the statute is invalid if it be construed as impliedly declaring that the furnishing of spur track facilities to any existing or proposed industry or enterprise because necessary to the successful operation thereof is a public use.

And also that unless under exceptional circumstances private property cannot be taken under the power of eminent domain for the promotion of private enterprises on the ground that such enterprises will promote the general advantage and prosperity.

1. *The statute in question is invalid because it does not declare in terms or by necessary implication that the use for which it authorizes the taking of private property is a public one.*

In providing for the condemnation of private property the legislature must determine in the first instance whether the use for which it is proposed to make the condemnation is a public one, but this determination is not final. All courts concur in holding that whether a particular use is public or not within the meaning of the constitution is a question for the judiciary.

Lewis Eminent Domain (3d Ed.), Sec. 251.
3 Dillon Municipal Corporations (5th Ed.), Sec. 1039.
Hairston v. Railroad Co., 208 U. S., 598.

Whether the power be exercised directly by the legislature or mediately through municipal corporations or other public agencies, the purpose or use for which private property is

authorized to be appropriated should be specified by the legislature, and the power will not be enlarged by doubtful construction.

Lewis Em. Dom. §§ 371 et seq.

3 Dillon Municipal Corporations (5th Ed.), Sec. 1039.

And it is essential to the validity of any condemnation statute that it shall show upon its face that the use for which property may be taken under it is a public one. Statutes which either indicate that the use is private or fail to declare expressly or by necessary implication that it is public have uniformly been condemned.

Whenever private property is authorized to be taken or affected under the power of eminent domain or of taxation or the police power, the law itself must save the owner's rights and not leave them to the discretion of the courts as such.

Railroad Co. v. Stock Yards Co., 212 U. S., 132-144.

Security Co. v. Lexington, 203 U. S., 323-333.

A statute of California authorized land to be taken for a drainage ditch upon petition of land owners and a finding that the ditch would be conducive to the general welfare of the petitioners. The supreme court of that state held the statute invalid, saying:

"This statute may be read in vain to discover any expression or intimation that the taking in this case is for a public use. The proceedings may be initiated by two men. They are required to be land owners, but so loosely is this statute drawn that it is not required that the land which they own shall be so situated as to be affected by the proposed ditch. As authority for initiating the work and for taking the land of a private owner for the indicated purposes, the supervisors have but to find not even that the construction of the ditch will benefit the lands of the petitioners but merely that it will conduce to their general welfare. It is nowhere in the act expressed or contemplated that the interests or convenience of the public or of any community is to be subserved, yet excepting for these purposes private property may not be taken. To the contrary the very language of the statute negatives the idea that public interests are in consideration since it imposes upon the supervisors the duty of ordering the work when they shall find its con-

struction will be conducive to the general welfare of the two or three or four persons who petition. * * * * It is for the legislature in the first instance to show that the consideration for the taking of private property is a consideration of public necessity or convenience."

Nickey v. Stearns Ranchos Co., 126 California, 150.

A statute of Ohio authorized the laying out of a ditch across private lands for the purpose of draining other lands and at the expense of the owners of the lands drained. The supreme court of that state held it invalid, saying:

"But it is a much more serious subject of inquiry, whether this section does not, in effect, authorize the entry upon lands and the construction of drains, when demanded by private interest merely, without reference to the public interest, convenience or welfare. It seems to us clear that it does. If the trustees had been authorized to locate and provide for the opening of a ditch only in case they found the same to be demanded by, or conducive to, the public health, convenience, or welfare, then their action under legislative authority would be but an ordinary and legitimate exercise of the right of eminent domain. But this statute prescribed no such condition—no such rule of official duty or limit to official discretion; and a ditch may be located and opened upon the lands of individual proprietors solely for purposes of private interest, irrespective of the public welfare without infringing any provision of this act, either express or implied."

Reeves v. Treasurer of Wood Co., 8 Ohio State, 333.

A similar statute of Indiana was held invalid by the supreme court of that state which in its opinion said:

"Unless a general law in this state for the drainage of wet lands makes proper provision for the determination in each proceeding of the question whether the particular ditch or system of drainage will be of public utility or promote the public health, welfare and convenience it will be unconstitutional and void. Under any other rule, the property of an individual could be assessed with benefits to construct a drain for the improvement of another's property where there was no public benefit whatever."

Gifford Drainage Dist. v. Shroer, 145 Indiana, 572.

A like ruling was made by the supreme court of Iowa which further held that the particular proceedings in question could not be supported by a finding of the commissioners, that public necessity required the draining of the lands. The court said:

"It seems to us that the constitutionality of a statute does not depend upon the finding of the trustees in a particular case. If the statute is unconstitutional, it is void and no valid act can be based thereon."

Fleming v. Hull, 73 Iowa, 598.

An amendment to the constitution of New York adopted in 1894 provided that:

"general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches and dikes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes."

A statute was enacted to carry this provision into effect and in a proceeding under the statute the court of appeals held both the constitutional provision and the statute void as being in contravention of the provisions of the 14th amendment to the constitution of the United States prohibiting the taking of property without due process of law.

Matter of Tuthill, 163 New York, 133.

Speaking of the necessity that a statute authorizing the taking of private property under the power of taxation shall show the taking to be for a public use, the supreme court of Wisconsin, by Ryan C. J., said:

"And this must appear affirmatively in the statute, to support the power. Taxation is the absolute conversion of private property to public use. And its validity rests on the use. In legislative grants of the power to municipal corporations the public use must appear."

Attorney General v. Eau Claire, 37 Wisconsin, 437-8.

And in another case the same court declaring invalid a statute authorizing the taking of land for a drain "for agricultural, sanitary or mining purposes," said:

"There is in the entire statute no expression or intimation that it was any part of the consideration upon which the improvement should be authorized that it should be either necessary or desirable to promote any public interest, convenience, or welfare. * * * *

"It is no doubt for the legislature to specify the use and purpose for which it authorizes private property to be appropriated. It should be expressed clearly; for it cannot be enlarged by a doubtful construction, nor be presumed to be larger than the purpose which is expressed."

Theresa Drainage District, 90 Wisconsin, 304-5.

If it be said that by authorizing the taking of private property whereon to lay a spur track when necessary to the successful operation of an industry or enterprise the legislature has declared the construction of such spur track to be a public use, the answer is that the language of the statute does not warrant such an implication. All condemnation statutes are to be strictly construed in favor of the property owner and the public use must clearly appear.

1 Lewis Eminent Domain (3d Ed.), Sec. 388.

The vice of this statute is that it nowhere requires determination that the use for which it is proposed to take is a public one, but only that it is practically indispensable to the conduct of private business. And by placing power to compel the construction of the desired spur track in the hands of those to be served thereby, it enables them for their own convenience and necessity to control the property of others.

Eubank v. Richmond, 226 U. S., 137.

In *Union Lime Co. v. Railroad Commission,* 144 Wisconsin, 523, which was an action to set aside a previous order of the railroad commission requiring construction of a spur track for the same purpose and to serve the same parties as that involved in this case, the supreme court of Wisconsin said:

"Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent

equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it. And this is the crucial test as to whether or not the track is a private or public one. If it is open to the use of any one who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of any one else using it, or the extent of such use. Chicago & N. W. R. Co. v. Morehouse, 112 Wis., 1, 87 N. W., 849; Ulmer v. Lime Rock R. Co., 98 Me., 579, 57 Atl., 1001. That such tracks are to be open to the use of the public generally is clearly evidenced by the statute, for it speaks of the industry *primarily* to be served and makes provision for others securing the same service by sharing in the initial cost, thus evincing a clear intent to subject the track, upon equitable terms, to the use of any one who may acquire it. Its operation, too, is subject to state control under general laws, and neither the railroad nor the owner of the industry can in any respect interfere with such control. The reasons for holding the provisions of Section 1831a, Stats. (1898), constitutional apply more strongly to the provisions of Section 1797-11m, and they are so clearly set forth in the case referred to that a more extended discussion of the subject here is not deemed necessary."

This is not a construction of the statute but the reasoning of the court as to its effect. The statute does not say that the spur track shall form a part of the general trackage of the railway open to public use and to be operated as all other portions are. The only right which the statute gives to any other person than the industry for whose benefit it is originally constructed is to connect therewith upon payment of a proportionate share

of its cost. As will appear later, this particular track if built will be entirely inaccessible to the public at large.

While the federal courts are bound by the decision of a state court as to the proper construction or meaning of a state statute or constitution, they are not bound by the decision of the court as to the statute's purpose or effect. A decision involving the latter invokes general reasoning and applies general principles and is not a local question.

> Olcott v. The Supervisors of Fond du Lac Co., 16 Wall., 678.
>
> Pana v. Bowler, 107 U. S., 529.
>
> Great Southern Co. v. Jones, 193 U. S., 532.
>
> Scott v. McNeal, 154 U. S., 34.
>
> Town of Venice v. Murdock, 92 U. S., 494.

This court therefore is not bound by the above reasoning of the Wisconsin court and the conclusion drawn therefrom that in consequence the track is a public one and private property may be taken for its construction.

2. *Providing facilities, however indispensable, for the conduct of private business generally is not a public use.*

No such statute as that of Wisconsin which is here involved has ever been before this court for consideration as to its validity and after diligent search we have been unable to find its parallel in any other state. The cases which have hitherto come to this court for review of the action of state courts in upholding the taking of private property under the power of eminent domain have been of two classes:

(1st) Those arising under general condemnation statutes, in which class of cases the question has been whether the facts of the particular case showed a taking for some recognized public use; and,

(2d) Those arising under special statutes declaring the furtherance of some particular branch of industry to be a public use in aid of which the power of eminent domain may be

exercised. Nearly all of the cases in the state courts may also be assigned to one or the other of these classes. None of the cases previously decided by this court involved a statute which like that of Wisconsin declares that the power of eminent domain may be exercised to provide spur track or switching facilities whenever practically indispensable to the successful operation of any existing or proposed industry or enterprise, though in many cases this court has denied that this power, or the power of taxation, can be exerted for similar purposes.

Neither of the above mentioned class of cases is decisive upon this, and the first is inapplicable, for in that class, to which belong most of the cases decided by the state courts, the proceedings were had under general statutes granting the power of eminent domain for unquestioned public uses, and the question whether the taking in the particular case was for a public use arose as a question of fact. In a number of these cases it has been held that land may be taken by a railway company for the construction of a spur track if it appears that the track is to be used by the taking railway in discharge of its duty to the public, and hence is intended for public use, and is so located that it can be used by the public, although it may appear that when built the track will be of special advantage to private parties and may have been located with reference to its use by private parties. To this class belongs the case of *Hairston v. Railway Co.*, 208 U. S., 598.

In that case the railway company sought condemnation of a strip of land upon which to lay a spur track which it alleged was needed for the enlargement of its facilities in serving the public generally in the reception and delivery of freight at an important station. It claimed that it had located the proposed track in the most available place for public use but conceded that it was also influenced in making the location by the fact that thereby a large tobacco industry could be reached. The land owner contended that the record, which included all the evidence, showed "unmistakably that the taking was for private uses and that the claim of the railroad company that the spur track was designed in part for public uses is no better than

a colorable pretense." (208 U. S., 605.) No question of statutory construction was involved, but only one of fact. The same is true of most of the cases in which state courts have upheld condemnation for spur tracks to private industries.

Railroad Company v. Porter, 43 Minnesota, 527.
Ulmer v. Lime Rock Co., 98 Maine, 579.
Railway Company v. Morehouse, 112 Wisconsin, 1.
Railway Company v. Petty, 57 Arkansas, 359.
Railway Company v. Dix, 109 Illinois, 237.
Quarry Company v. Railway Co., 175 Indiana, 303.
Railroad Co. v. Moss, 23 California, 323.
De Camp v. Railroad Co., 47 New Jersey Law, 43.

None of this class of cases arose under statutes making the test of the right to condemn the necessity of a private interest. In all of them the question whether the track was for public use arose as a question of fact upon the evidence, and wherever the courts found from the evidence that the claim of public use for the spur track was merely "a colorable pretence" to conceal the real purpose of serving private industries the right of condemnation has been denied.

It is manifest that this class of cases has no bearing upon the question involved in the instant case. The statute here involved does not submit to the railroad commission or to the court the question whether a proposed track will be for public use. It confines the inquiry to the necessity of the industry or enterprise and by so doing excludes the issue of public use.

Of the second class of cases above mentioned—those arising under special statutes declaring the furtherance of certain branches or kinds of industry to be a public use for which the power of eminent domain may be exercised, leading examples in this court are:

Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 112.
Clark v. Nash, 198 U. S., 361.
Strickley v. Mining Co., 200 U. S., 527.

The first of the cases just cited sustained a statute of California authorizing condemnation of lands by a corporation for the purpose of making reservoirs and digging ditches to supply land owners with water; the second upheld a statute of Utah as to one paragraph thereof which authorized condemnation by a private person of right of way for an irrigation ditch; and the third upheld another paragraph of the same Utah statute which the state court had held authorized the taking by a private corporation of land for an aerial railway to reach mines.

To these may be added a considerable number of decisions of state courts affirming the validity of similar statutes. Most of the statutes approved in these decisions have reference to the development of agriculture or mining or water powers or the draining of swamp lands, and all relate to some particular industry or industries which so affect the community as a whole that their successful prosecution is fundamentally necessary to the common welfare and which are so surrounded by exceptional circumstances as to require the intervention of the state for their prosecution or development. No statute has hitherto been sustained which like that of Wisconsin declares the necessity of any and every existing or proposed industry or enterprise a sufficient ground for exercising the power of eminent domain in its aid. Among the decisions of the state courts in cases of this class are the following:

Bankhead v. Brown, 25 Iowa, 540.

Coal Co. v. George's Creek Coal Co., 37 Maryland, 537.

Phillips v. Watson, 63 Iowa, 28.

Chesapeake Co. v. Moreland, 31 Kentucky Law Reporter, 1075.

Kipp v. Copper Co., 41 Montana, 509.

Zircle v. Railroad Company, 102 Virginia, 17.

The grounds upon which statutes of this kind have been upheld are thus stated in *Strickley v. Mining Co., supra* (page 531) where in commenting upon the decision in *Clark v. Nash, supra*, this court said:

"While emphasizing the great caution necessary to be shown it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the 14th amendment which prevents a state from requiring such concessions."

Lest this doctrine might be misunderstood and carried beyond its intended limits, this court said in *Clark v. Nash*, *supra* (page 369):

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case and upon the facts stated in the findings of the court and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual."

The state courts have rested their decisions upon similar grounds. In *Bankhead v. Brown*, supra, Judge Dillon, speaking for the court, says:

"So the state may provide that a public way may be established to coal or other mines. Mineral wealth is not to be locked up forever beyond the power of the legislature to force a public passage to the mines to enable the owner to get it to market and others to reach the mines in order to buy it there."

And in *New Central Coal Co. v. George's Creek Coal Co.*, supra, Judge Alvey, of the Maryland court said:

"The primary object of the charter in this case, as in a great many others granted by the legislature, was to enable the corporators to work the mineral lands of the state and to transport the produce of the mines to market. It has certainly been the settled policy of the state for many years past to stimulate enterprise and to encourage the combination of capital for the purpose of developing the large mineral resources in the western portion of the state, as upon their full and successful development depend, in a great measure, the success of the works of internal improvement, upon which the state has expended many millions of money. *As means of wealth and revenue therefore, the state has a material interest in the operation of the coal and*

other mineral lands in that section; and the statute book within the period of the last thirty or forty years will abundantly attest the policy of the state upon the subject by the great number of liberal charters granted, all having for their object the same general purpose as the charter before us. Indeed, among the first of these charters (Act of 1835, Chap. 328) was one to the appellees containing provisions and powers in nearly all respects similar to that granted to the appellants. It was under that charter that the railroad was made with which the appellants propose to connect their road, and it is by an express condition in that charter that the right is reserved to the citizens or other incorporated companies to make such connection. In all the mining charters granted, as also in the general law providing for the formation of mining corporations, power is given to construct railroads, coupled wi'h the power to obtain the right of way by condemnation. Indeed, without such right and a general ramification of railroads through the coal fields, many of the most valuable mines could be but very partially and imperfectly worked, and much of the coal could never be got to market. Without the facility of transportation from the mines by railroads there would be little or no inducement to the investment of capital, and but small progress could be made in developing the vast mineral wealth of the state in which the public at large are interested. To furnish the requisite facilities for the construction of railroads for the successful operation of the mines, is therefore in some sense a public necessity, and that being so, the use of the ways for such roads may well be said to be public, and therefore the right of condemnation exists."

This court is now asked to extend this doctrine and hold it to be a public use for which private property may be taken to provide spur track facilities whenever the same are practically indispensable to the successful operation of any industry or enterprise, existing or proposed, of whatever kind or character and of whatever magnitude, large or small. Such a sweeping declaration of public use can find support only in the theory that whatever contributes to the public interest and advantage by developing natural resources or promoting industrial enterprises will justify exercise of the power of eminent domain. This view seems to have influenced the supreme court of Wisconsin in upholding the statute in question for in *Union Lime Company v. Railroad Commission*, 144 Wisconsin, 523, in which case the statute and this particular spur track first came before that court, it is said (page 533):

"Over it the products of the industry find their way into the markets of the world and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof."

This court has always held a contrary doctrine. It has repeatedly denied the right to take property under the power of eminent domain or of taxation for the promotion of industrial enterprise or the development of natural resources except under unusual circumstances such as those referred to in *Clark v. Nash*, supra, and *Strickley v. Mining Company*, supra.

A statute of Kansas authorizing the common council of a city to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve the city by appropriations from the general fund or the issuance of bonds was held void as authorizing the taking of private property for private use.

Loan Association v. Topeka, 20 Wallace, 655.

A similar statute of Missouri was held void upon the same ground.

Cole v. La Grange, 113 U. S., 1.

A state cannot take property under the power of eminent domain for the purpose of creating a water power to be leased for manufacturing purposes.

Kaukauna Company v. Canal Company, 142 U. S., 254, 273.

Nor can a state require a railway company which has permitted the erection of two elevators by private persons on its right of way at a station to grant upon like terms and conditions a location upon that right of way to other private persons for the purpose of erecting thereon a third elevator.

Railway Company v. Nebraska, 164 U. S., 403.

Nor can a state require a railway company to construct upon its right of way a spur track to reach an elevator on private land adjacent thereto.

Railway Company v. Nebraska, 217 U. S., 196.

The case last cited which arose under a Nebraska statute is directly in point upon the question presented here. The Nebraska statute differed from the one here involved in three particulars only: (1) The Nebraska act applied only to grain elevators, while the Wisconsin statute applies to any "industry or enterprise"; (2) the Nebraska act required construction of a switch or spur track only upon right of way already owned by the railway company, while the Wisconsin act requires the acquisition of new right of way; and (3) the Nebraska act imposed the cost of the switch or spur track upon the railroad company, while the Wisconsin act makes the industry or enterprise bear such cost.

These differences so far as they may be material but serve to weaken the Wisconsin statute as compared with that of Nebraska. Certainly it cannot be claimed that the requirements that spur tracks shall be built to any "industry or enterprise" instead of to grain elevators only, or that a new right of way shall be acquired instead of using one already possessed, or that the cost shall be borne by the industry or enterprise instead of by the railroad, have any tendency to show that lands taken for such purposes are for public use.

If, as held in the case cited, the railroad company cannot be compelled to build a side track entirely upon its own right of way to reach and serve an elevator adjacent thereto and pay the expense thereof because to do so would take the railroad property for private use and deprive it of its property without due process of law, *a fortiori*, it cannot be compelled to acquire a new right of way and build a spur track thereon to reach a remote grain elevator or other industry or enterprise, and it necessarily follows that if the railroad company cannot be compelled to acquire a right of way land cannot be taken with-

out consent of the owner, whether the cost be borne by the railroad company or by the industry or enterprise to be served. A railroad company may be compelled by statute to provide whatever facilities are necessary to the discharge of its duties to the public and whatever lands of private persons may be required for such purposes may lawfully be taken under the power of eminent domain. But a railroad company cannot be forced to provide facilities not required for the discharge of its duty and it cannot either under compulsion or of its own motion condemn lands for such facilities.

This Wisconsin statute can only be upheld upon the theory that the words "public use" mean the same as "public interest" or "public advantage." This the decisions of this court deny in harmony with the great weight of authority upon the subject.

Mr. Lewis in the 3d edition of his work on Eminent Domain says, in sections 256-258:

"Many courts seem to treat the question of *What is a public use?* as though the question was *For what purposes may the power of eminent domain be properly exercised?* This is a serious error. * * * * To give these words any effect, they must be construed as limiting the power to which they relate, that is, as limiting the purposes for which private property may be appropriated. As the power is by its nature limited to such purposes as promote the general welfare, it is evident that the words 'public use,' if they are to be construed as a limitation, cannot be equivalent to the general welfare or public good. They must receive a more restricted definition. The different views which have been taken of the words 'public use' resolves themselves into two classes; one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility, or advantage. It is, of course, impossible to reconcile these different views, and the question is, which one is correct? * * * * The use of a thing is strictly and properly the employment or application of the thing in some manner. The public use of anything is the employment or application of the thing by the public. Public use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are, first, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private

property for public use in vogue when the phrase was first brought into use in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application."

And Judge Cooley in his treatise on Constitutional Limitations (6th Ed., page 655,), says:

"It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may rightfully be dispossessed. It may be for the public benefit, that all the wild lands of the state be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty —perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide."

Under the Wisconsin statutes the duty of the railroad to build a sidetrack and its right to condemn right of way therefor are not limited to any particular class of industries and are not made to depend upon the relation of such industries to the public welfare, but extend to all industries and enterprises alike, great and small, and depend only upon their necessities. This under the authorities above cited is not a proper basis upon which to rest the exercise of governmental power, and in all cases which we have found involving statutes which made private interest the test they have been declared invalid.

Matter of Tuthill, 163 New York, 133.

Apex Co. v. Garbade, 32 Oregon, 582.

Healty Lumber Co. v. Morris, 33 Washington, 490.

Railroad Company v. Gypsum Company, 154 Michigan, 290.

Ryerson v. Brown, 35 Michigan, 333.

Water Company v. Judge, 133 Michigan, 48.

Oil Company v. Hawkins, 30 Indiana App., 557.

Welton v. Dickson, 38 Nebraska, 767.

Fleming v. Hull, 73 Iowa, 598.

Phosphate Co. v. Phosphate Co., 120 Tennessee (12 Cates), 260.

Donnelly v. Decker, 58 Wisconsin, 461.

Priewe v. Wisconsin Improvement Co., 93 Wisconsin, 534.

Maginnis v. Ice Co., 112 Wisconsin, 385.

Huber v. Merkel, 117 Wisconsin, 355.

Many more cases might be cited affirming this view, which seems to be well-nigh universal.

The Wisconsin supreme court in deciding the instant case did not enter into any discussion of the objections raised to the statute, but decided the case upon the authority of its previous decision in the case of *Union Lime Company v. Railroad Commission*, 144 Wisconsin, 523, which latter case in turn was decided mainly upon the authority of *Railway Company v. Morehouse*, 112 Wisconsin, 1. This last named case arose and was decided under section 1831a of the Wisconsin Statutes (which is herein set out in full at page 2, supra), which is very different from the statute under which this case arose. The statutes, the pleadings and the findings in the two cases are all different.

1. Section 1831a, under which the *Morehouse* case arose, is an enabling act enlarging the field within which the power of eminent domain may be exercised by Railroad Companies existing under public franchises and already possessing the right

to exercise that power for public uses. There is no declaration that a spur track to serve the necessities of any and every industry or enterprise is a public use, and as intimated in the *Morchouse* case in construing that statute it may well be implied that it authorizes the construction only of such spur tracks as will in fact serve the public. The statute does not make the necessities of the industry or enterprise the criterion, as is the case with the statute now before the court.

2. The petition of the Railway Company in the *Morchouse* case after alleging that the company desired to construct a spur track in a designated locality alleged:

"That the locality referred to is in the immediate vicinity of Wallace Lake, in the State of Wisconsin, upon and near which are located very important ice industries;

"That in the operation of said industries great quantities of ice are taken from said Wallace Lake and stored in icehouses immediately adjacent thereto, from which said ice is shipped by rail to various cities in various states;

"That other ice industries and houses are to be erected and operated in said locality in the immediate future;

"That in order for said ice industries to be operated and maintained railroad shipping facilities are required and spur and sidetracks are necessary in the immediate proximity of said icehouses, upon which cars can be placed at said icehouses, so that ice may be transferred from said icehouses to said cars and said cars so loaded be transferred therefrom over and along side and spur tracks to the main line of the Railroad Company over which the same are to be shipped."

And after describing the land to be taken further alleged:

"That said real estate is required and is necessary for the purpose of operating such road (petitioner's railroad) and for the purpose of constructing, operating and maintaining said spur track to said industries; that it is the intention of said corporation, your petitioner, in good faith to use it therefor."

It was in denial of these allegations and to show that they were a subterfuge that it was alleged by the land owner in his answer that the proposed track was in fact intended only for the use of a single ice dealer.

In the present case the only allegation of the necessity for taking appellant's land and that it is to be taken for a public

use is the order of the Railroad Commission made under the statute in question upon the petition of the Eden Company, which order determines only that the spur track is practically indispensable to the conduct of the Eden Company's proposed business, that being the only fact which the statute submits to the determination of the commission.

3. In the *Morehouse* case there was abundant evidence that not one, but several ice plants would be served by the proposed track, and the court so found and

"that railway facilities such as the proposed spur track was designed to furnish were necessary to the successful operation of such an industry and *to the convenience of the petitioner in the public business of furnishing shipping facilities* for the handling of ice." (112 Wisconsin, 7.)

In the present case there was no evidence and there is no finding that any industry except that of the Eden Company will be served by the proposed spur or that the spur is necessary *"to the convenience of the petitioner, in the public business of furnishing shipping facilities."* The only finding of the court in the present case is that the Railroad Commission determined "that a spur track * * * * is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime and Stone Company."

It is not questioned that the construction of spur tracks by Railroad Companies may often be necessary to enable them to perform their public functions of furnishing shipping facilities, and when such is the case the power of eminent domain may be exercised to obtain right of way for such spur tracks as well as for main line. The *Morehouse* case in the pleadings, evidence and findings presented such a case. The instant one does not. Section 1831a can be construed as applicable to such cases. The statute we are considering cannot, because the latter prescribes as a test not the public use, but the private necessity.

It will be seen that the *Morehouse* case is in all respects similar to *Hairston v. Railway Company*, supra, and other cases of that class, and does not support the proposition that it is a public use to construct spur tracks because necessary

for the operation of any kind of an industry, and none of the cases cited by the court in support of its decision in the *Morehouse* case were decided under a statute which like the one we are considering requires or authorizes taking of private property upon which to lay a spur track merely because such track is needed for the operation of a private enterprise. No statute prescribing such a test has been upheld in either state or federal courts so far as we have been able to discover.

III.

The Findings of Fact in the Present Case Show a Taking for Private Use.

No evidence was introduced upon the hearing of this case in the trial court. The allegations of fact contained in both petition and answer were admitted, and from them the court made its findings and embodied them in the order or judgment from which an appeal was taken to the supreme court and which was affirmed by the latter court.

As matters of fact the trial court found:

1. That a spur track connecting, at its eastern terminus with the western terminus of said track designated on the map annexed to the petition as "Loading Track," and running thence westerly to the plant and premises of said Eden Independent Lime & Stone Company (as marked in yellow on the map annexed to the petition), is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime & Stone Company; that its construction and operation are not unusually unsafe or dangerous; that it is not unreasonably harmful to public interest. (Transcript 18.)

2. That the spur track which the petitioner desires to construct, operate and maintain, will not alone, or together with the track by which it will be connected with the main line, exceed five (5) miles in length from said main track of said petitioner's railroad. (Transcript 19.)

3. That it is the intention of said corporation, the petitioner, in good faith to use said real estate sought to be acquired in this proceeding, for the uses and purposes herein set forth. (Transcript 19.)

4. That the existing spur track, together with the branches, switches and sidings, were constructed many years ago under and pursuant to agreement between the predecessor in title to the petitioner on the one part, and the predecessor in title of the Union Lime Company and Nast Brothers Lime & Stone Company of the other part, and have, since construction and hitherto, been used in serving the plants and business of said last mentioned companies, and no other plants or business, and that the plants of the Union Lime Company and the said Nast Brothers Lime & Stone Company have been constructed and arranged with reference to the use and service afforded by said existing spur track and branches and switches and sidings thereto. (Transcript 19.)

5. That the said Eden Independent Lime & Stone Company was organized and exists as a corporation for the purpose of engaging in the business of operating stone quarries and lime works and manufacturing, selling and dealing in lime and other building material, and was and is a private corporation organized and existing solely for the pecuniary benefit and profits of its stockholders. (Transcript 20.)

6. That the proposed sidetrack will begin upon the land of the Union Lime Company and terminate upon the land of said Eden Independent Lime & Stone Company and throughout its course will extend and will be laid entirely over and upon the lands of the said two companies, and will not be accessible at any point by or from any existing public highway, and cannot be reached by the public generally, or by any one except said Eden Independent Lime & Stone Company and the Union Lime Company, without crossing lands of either of said companies. (Transcript 20.)

These are all the facts which were found by the court or were submitted to the court in the pleadings relating to the use of the track or the circumstances affecting it, and it is upon

these facts alone that the court rested its further finding, to-wit:

"That the use for which said lands is sought to be taken and condemned is a public use." (Transcript 20.)

This latter finding cannot aid the judgment for several reasons:

(1) It is in the nature of a conclusion of law and the facts found by the court as above stated do not show a public use, but on the contrary that the proposed spur track is not intended to be used and cannot be used by any one except the Eden Company, for it is to be so located that no one else can have access to it as a matter of right.

(2) The finding of public use is expressly based upon the assumed validity of the statute under which the findings were had.

(3) Even if it were shown that this particular sidetrack might be of public use, inasmuch as the condemnation proceedings are based entirely upon sections 1797-11m and 1797-12n, if those sections are invalid, condemnation proceedings under them cannot be sustained.

It is essential to the validity of proceedings for the taking of land for spur track purposes that the track, when built, will in fact be accessible to the public. The mere theoretical right of the public to use it is not sufficient.

Hairston v. Railway Company, 208 U. S., 598.

De Camp v. Railroad Company, 47 New Jersey Law, 43.

Wallman v. R. Connor Co., 115 Wisconsin, 617.

In *De Camp v. Railroad Company*, supra, the supreme court of New Jersey said:

"A particular improvement palpably for private advantage only will not become a public use because of the theoretical right of the public to use it."

In *Wallman v. R. Connor Co.*, supra, the supreme court of Wisconsin said:

"To be public it must not only be nominally open to use by the public, but it must be so located that the public can get onto it at some point. A strip of land lying entirely within the lines of private ownership upon which the public cannot possibly enter without committing trespass on private property cannot be held to be a public way." (115 Wisconsin, 620.)

A comparison of the statutes herein set out (supra pages 2-4) demonstrates that the purpose of passing the act of 1907 was not to provide for the construction of spur tracks for public use, but to enable the owners of private industries to compel the construction of such tracks when their business necessities required. That it was the intention to vest in persons controlling existing or proposed industries the power to compel construction of spur tracks when necessary to the operation of such industries is apparent from a consideration of the statutes in force at the time the act of 1907 was passed.

Under section 1802 of the Wisconsin Statutes, supra, private parties then had the right within certain limits to construct sidetracks at their own expense which railroads were required to maintain and operate in their behalf, but did not have the right to condemn right of way therefor. This statute recognized that right of way for tracks necessary to serve private industries must be acquired by purchase and could not be taken by eminent domain.

Section 1831a, supra, gave to railroads the right to build spur tracks to reach and serve industries. This statute, however, did not make the right to build dependent upon the necessity of the industry, but inferentially upon the public use. It is an enabling act enlarging the limits within which the power of eminent domain may be exercised by railroad companies existing under general laws and already possessing the right to exercise that power for public uses. In a case where the pleadings alleged the evidence proved and the findings found a public use to exist for the particular track in question, this section was held valid.

Railway Company v. Morehouse, 112 Wisconsin, 1.

Section 1797-3, being part of the railroad commission act, provided that "every railroad is hereby required to furnish reasonably adequate service and facilities," and other sections of the commission act gave to that body ample powers to compel performance of this public duty. It will be seen therefore that under section 1831a railroad companies could use the power of eminent domain to procure right of way for spur tracks to industries as well as for main lines, and under section 1797-3 they could be compelled to exercise this power and construct such spur tracks whenever necessary "to furnish reasonably adequate service and facilities." Thus under these sections, there existed prior to the passage of the act of 1907 here involved full power for the construction of all spur tracks necessary to discharge the public duties of the railroads and full power in the railroad commission to compel them to procure the necessary right of way by condemnation if necessary and build such tracks whenever adequate service and facilities to the public required. There was therefore no necessity for further legislation, either to enable railroads voluntarily or to coerce them against their will to construct all spur tracks needed for public use.

But there was a gap. Private parties could in certain cases build their own sidetracks provided they owned or could purchase the right of way therefor. Railway companies could on their own motion build spur tracks and condemn land for that purpose and could be compelled by the Railroad Commission "to furnish reasonably adequate service and facilities," but there was no statute making it obligatory on railway companies to build a spur track whenever the necessities of an industry required it, or placing in the hands of those controlling industries the power to compel the building of spur tracks. It was evidently to fill this gap that the act of 1907 was passed.

We submit:

(1) That the act of 1907, now sections 1797-11m and 1797-12n of the Wisconsin Statutes, shows on its face that the

use for which it authorizes property to be taken under the power of eminent domain is a private and not a public one.

(2) That its history and place in the legislation of Wisconsin show that it was intended to enable private parties to procure sidetrack facilities when their necessities required, whether needed for public use or not.

(3) That the record in this case shows that the proposed sidetrack if built will be for the exclusive use of the Eden Company and will not be accessible to or capable of use by the public.

For the reasons hereinabove set forth we ask that the judgment of the supreme court of Wisconsin be reversed.

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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 529.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

UNION LIME COMPANY,

Plaintiff in Error,

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

REPLY BRIEF FOR PLAINTIFF IN ERROR

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SUPERIOR PRINTING COMPANY, MILWAUKEE.

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I.

In his brief filed herein as *amicus curiae*, the attorney general of the state of Wisconsin presents an entirely new contention as to the statutory source of the power of eminent domain sought to be exercised in this case and the construction of the act of 1907 (Sections 1797-11m and 1797-12n). He contends:

"That said statute does not either expressly or by implication create or confer any power of eminent domain;

"That said statute is simply a legislative declaration of the duty of the railroad common carrier to furnish a given class of public railway facilities under certain circumstances and conditions therein prescribed;

"That the conditions prescribed * * * * *are neither more nor less than a legislatively declared measure of what is reasonable* as to this class of railroad facilities." (Brief page 6.)

That "the power of eminent domain to acquire the right of way for such spur track is exercised under section 1831a. The conditions and limitations prescribed by the legislature *as a measure of the reasonable service to be required* in the language of the act of 1907 are therefore *not a test or declaration of the character of the use* of such spur track when constructed either for the purpose of supporting or denying the power of eminent domain to acquire the right of way therefor.

"Hence the act of 1907 is not properly before the court for consideration in this case. It has been drawn into question only by reason of counsel's misconception of its nature, purpose and effect. No reference to the provisions of that act was either necessary or material in the condemnation proceedings brought here for review. True, the *duty of the railway company* to construct the spur track in question was fixed and established by and pursuant to the act of 1907, but *when that duty became fixed that act ceased to have further application to the proceedings.* It was then the duty of the railway company to proceed under the ample power conferred upon it by section 1831a and to acquire in the manner provided in chapter 87 the necessary right of way." (Brief pages 8, 9.)

The italics in the foregoing quotations are the attorney general's.

In substance the argument of the attorney general seems to be that the act of 1907 is in effect an amendment to section 1831a, merely declaring it to be the reasonable duty of a railroad to construct and operate a spur track whenever "practically indispensable to the successful operation of any * * * * industry or enterprise," leaving the power of eminent domain when necessary to be exercised in the performance of such duty to rest upon section 1831a as it stood before the legislation of 1907.

This view is directly contrary to that taken by the Wisconsin courts in the two cases which have arisen under the act of 1907, and even if sound would not in any wise affect the question now presented for decision.

1. The act of 1907 has been before the supreme court of Wisconsin in two cases only, both involving the construction

of a spur track to serve the defendant in error, Eden Company, and the latter of the two being the one in which the judgment brought up by the pending writ of error was rendered. These two cases are *Union Lime Company v. Railroad Commission*, 144 Wisconsin, 523, and *Chicago & Northwestern Railway Company v. Union Lime Company*, 152 Wisconsin, 633.

In the first of these cases the Eden Company in August, 1909, filed a petition with the Railroad Commission of Wisconsin, praying that the railway company, defendant in error, be required to construct a spur track. After making and vacating two orders, the Railroad Commission on April 1, 1910, made a third order directing the construction of a track identical with that involved in this action. Thereupon plaintiff in error commenced an action in the circuit court under the Wisconsin statute to set aside the order of the Railroad Commission, raising the same questions as to the validity of the act of 1907 that are raised in this case. The circuit court rendered judgment dismissing the complaint of plaintiff in error and affirming the validity of the order of the Railroad Commission. From this judgment plaintiff in error appealed to the supreme court of Wisconsin. The decision of that court is reported in 144 Wisconsin, 523. In its opinion that court said:

Vinje, J. The trial court expressly stated in its decision that it did not pass upon the constitutionality of sec. 1797-11m, Stats. (Laws of 1909, ch. 481), inasmuch as it held that the railroad company had valid easements across the lands over which the spur track was to be built and hence it was not necessary for it to invoke the power of eminent domain granted by the statute. Counsel for defendants suggest that this court may likewise dispose of the case without passing upon the constitutionality of said section. It appears, however, that the proceedings were in terms instituted pursuant thereto and that the Railroad Commission acted under it. That being so, it is not perceived how its acts thereunder can be valid if the statute itself is unconstitutional. Indeed, the trial court by its judgment dismissing the action sustained the validity of the proceedings and in effect held it constitutional. The fact that the Railroad Commission was not required to exercise all the powers conferred upon it by the statute did not obviate the necessity of passing upon its constitutionality, since the powers it did exercise were derived therefrom. So the case directly

involved the constitutionality of sec. 1797-11m." 144 Wisconsin, 530. (Here follows section 1797-11m in full.)

It further said:

"It will be observed from the first subdivision of the section that four facts must co-exist before a railroad can be compelled to acquire a right of way, construct, maintain, and operate a spur track, namely: (1) the spur track must not exceed two miles in length; (2) it must be practically indispensable to the successful operation of the existing or proposed plant, industry, or enterprise; (3) its construction and operation must not be unusually unsafe and dangerous; and (4) it must not be unreasonably harmful to public interest. The legislature has delegated to the Railroad Commission the power to determine whether or not these four facts co-exist. If the Commission finds that they do, then, upon the statute being complied with, the railroad is required to build the track, otherwise not. The exercise of such power by the Railroad Commission is not the exercise of legislative power and may therefore be delegated to it. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Commission*, 137 Wisconsin, 80, 117 N. W., 846; *Wayman v. Southard*, 10 Wheat., 1; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.*, 145 Wisconsin, 337, 129 N. W., 600.

"Plaintiffs challenge the constitutionality of the statute on the ground that the sidetracks provided for are private, and that land taken for right of way for such sidetracks is taken for a private and not for a public use, contrary to the provisions of sec. 13, art. I, of the constitution of this state, and contrary to the provisions of the XIVth amendment to the constitution of the United States. If it be conceded that the sidetracks are private, then the objections raised by plaintiffs must be deemed well taken. But the case of Chicago & N. W. R. Co. v. Morehouse, 112 Wisconsin, 1, 87 N. W., 849, negatives such a concession. It was there held that the taking of land for a sidetrack under section 1831a, Stats. (1898), was a taking for a public use even though the sidetrack ran to a single industry and the owners thereof were to bear a large part of the expense. That section authorized a railroad company in its discretion to acquire right of way by condemnation for a spur track not exceeding five miles in length to any industry therein mentioned, without any restrictions as to its being practically indispensable to the successful operation thereof, or unusually unsafe and dangerous, or unreasonably harmful to public interest. If it was a valid exercise of legislative power to authorize a railroad company, in its judgment, to condemn a right of way for a spur track five miles in length without any restrictions as to public safety or interest, it must

certainly be held to be so to authorize the Railroad Commission to order a spur track two miles in length to be built under the safeguards to public interests provided by sec. 1797-11m, Stats. (Laws of 1909, ch. 481.)" (144 Wisconsin, 532, 3.)

The judgment of the circuit court was however reversed and the order of the Railroad Commission held invalid because the Commission had ordered the construction of the track upon a different line than the one asked for in the petition and respecting the reasonableness of which no hearing had been afforded.

The decision of the Wisconsin supreme court in the above case was rendered January 10, 1911. Thereafter and on April 26, 1911, the Eden Company commenced the proceedings involved in the pending case by the filing of a new petition with the Railroad Commission upon which such proceedings were had that on June 30, 1911, the Railroad Commission made the order which is the foundation of the condemnation proceedings here involved. (Transcript 16.) Thereupon the Railway Company commenced the pending action which in due course reached the supreme court, whose opinion is reported in 152 Wisconsin, 633. In that opinion the court after reciting the order of the Railroad Commission said:

"The railway company's application to the circuit court for condemnation of the real estate for the proposed spur track is based upon this order of the railroad commission. The land proposed to be taken belongs to the *Union Lime Company*, a party to the proceedings. For additional facts involved in the proceedings, reference is made to those set forth in the report of the case in this court of *Union Lime Co. v. Railroad Commission*, 144 Wisconsin, 523, 129 N. W., 605.

"*The Eden Independent Lime & Stone Company*, intervener, asserts that the order appointing commissioners for condemnation of the lands specified in the petition, pursuant to the order of the railroad commission, is proper and valid. The appellant, the *Union Lime Company*, asserts the order is invalid and void, upon the ground that secs. 1797-11m and 1797-12m, Stats., under which the order was made, are unconstitutional, for the reason that these statutes attempt to confer authority on the railroad commission to authorize the taking of appellant's property for a private use; and because the taking of appellant's land, under the petition of the railway company herein,

as ordered by the lower court, is for a private use, therefore denies the appellant the equal protection of the laws, and is contrary to the Fourteenth amendment to the constitution of the United States. The trial court held that the use for which appellant's land 'is sought to be taken and condemned is a public use, and that such taking will not deprive the *Union Lime Company* of its property without due process of law, or violate any provision of the constitution of the United States or any amendment thereof.' The court held that the statutes above referred to did not in any of their provisions conflict with the provisions of the United States or state constitutions, and that the railroad commission of Wisconsin had power and authority to entertain the proceeding and to make the order heretofore referred to.

"The appellant, on this appeal, asserts no error save the contention that secs. 1797-11m and 1797-12n, Stats., are void because they violate the provisions of the Fourteenth amendment to the federal constitution. In the case of the *Union Lime Co. v. Railroad Commission*, 144 Wisconsin, 523, 129 N. W., 605, this appellant raised the same question on the appeal to this court, in an action to set aside the railroad commission's order to have the appellant's property condemned for a spur track, and this court declared the statutes constitutional.

"The railway company instituted this proceeding to condemn the appellant's property for railroad purposes, as directed in such order of the railroad commission. An examination of the questions as presented on this appeal discloses no new grounds or reasons which impeach the correctness of the conclusions announced in the decision on this question then before us, nor is anything submitted now, which in our view suggests that these statutes conflict with any of the provisions of the United States or state constitutions or any amendment thereof. We do not deem it necessary in the instant case to repeat the considerations which form the basis of the decision in the former case, and it suffices to say that the questions presented on this appeal are ruled by that case, and hence the order appealed from must stand." (152 Wisconsin, 636-637.)

These quotations from the opinions of the supreme court of Wisconsin in the only two cases which have arisen under the act of 1907 make it very clear that in the judgment of the Wisconsin court the right of a railway company to condemn lands for a spur track which it may be required to build thereunder springs from the same act which imposes the duty to "acquire the necessary rights of way for" such track. There is no refer-

ence in the decisions of the Wisconsin court to section 1831a or any other statute as the source of power to condemn right of way for a spur track which the act of 1907 may make it the duty of a railroad to build.

Upon familiar principles the decision of the state court is conclusive upon this question.

2. The act of 1907 is adequate in terms as a grant of the power of eminent domain. By the act the railroad company is not merely authorized but is commanded to "acquire the necessary rights of way for * * * * a reasonably adequate and suitable spur track whenever such spur track * * * * is practically indispensable to the successful operation of any existing or proposed * * * * industry or enterprise," and it is provided that "such railroad may require the person or persons, firm, corporation or association primarily to be served thereby to pay the legitimate cost and expense *of acquiring by condemnation or purchase the necessary rights of way for such spur track.*"

It does not need the aid of implication to discover in this act a grant of the power of eminent domain. It is found in express terms, but if implication were necessary it would be proper, for it is self-evident that in many cases the positive command of the statute could not be obeyed without resort to condemnation. Such being the case, the power would necessarily be implied even if there were no reference to it in the act itself.

Memphis v. Wright, 6 Yerg. (Tenn.), 497.

Stone v. Newborn, 127 Georgia, 421.

Providence v. Norwich, 138 Massachusetts, 277.

Pennsylvania R. Co.'s Appeal, 93 Pennsylvania State, 150.

Rockingham County L. & P. Co. v. Hobbs, 72 New Hampshire, 531.

Linton v. Bridge Co., 1 Grant Cases, 415.

10 A. & E. Enc. of Law, 1055.

Undoubtedly the procedure to be followed should be that outlined in sections 1845 and 1846, quoted in the attorney general's brief at page 3, which are purely practice statutes, and such procedure was in fact followed in this case. There is no need to resort to section 1828 or section 1831a, or any other statute, to find the delegation of power.

3. But if the contention of the attorney general be correct as to the statutory source of the power of condemnation, the issue presented to this court for decision is not changed.

If it be true as said by the attorney general in his brief that the act of 1907 "is simply a legislative declaration of the duty of a railroad common carrier to furnish a given class of public railway facilities under certain circumstances and conditions therein prescribed," and "that the conditions prescribed * * * * are neither more nor less than a legislatively declared measure of what is reasonable as to this class of railroad facilities" and that "the power of eminent domain to acquire the right of way for such spur track is exercised under section 1831a," the same question remains for determination, to-wit: May the legislature constitutionally either authorize or require the taking of private lands whereon to lay a spur track upon the determination of a commission or a court or any other body of no other use or necessity or purpose for the taking than that such spur track "is practically indispensable to the successful operation of any existing or proposed * * * * industry or enterprise."

In the attorney general's brief it is said: "Had the railway company been moving voluntarily to the construction of the spur track in question it would have so proceeded without reference on the pleadings to the act of 1907, and it would have had ample power of eminent domain so to proceed under the provisions of section 1831a." (Brief page 9.) From this and other parts of his argument we understand the attorney general to claim that section 1831a authorized a railway company to voluntarily condemn lands for the construction of a spur track upon showing that such track is practically indispensable to the successful operation of some industry or enter-

prise. So construed the validity of section 1831a is not conceded.

It is certain that section 1831a does not in express terms grant any such power or right. It nowhere refers to the necessity of any industry or enterprise as the test of the right to build, but by necessary implication limits the right and the grant of the power of eminent domain to cases where public use requires or justifies a spur track. Nor has the Wisconsin court ever held that under section 1831a a railroad can condemn lands for a spur track upon no other showing than that such track is necessary for some industry or enterprise.

As shown in our former brief the case of *Railway Company v. Morehouse*, 112 Wisconsin, 1, in the pleadings, evidence and findings of the trial court, exhibited a case where the necessity of the industry was not the controlling test, but the performance of its public duty by the railway company, and the supreme court of Wisconsin in its opinion said:

"The trial court concluded from the evidence that the end respondent had in view in seeking to acquire the real estate in controversy was to construct a spur track to the seat of an important ice industry for the purpose of facilitating the transportation of ice therefrom, and from any other such industry that might be established within reach of the proposed track, to various points in various states; that in the operation of the existing ice industry great quantities of ice would be handled from the source of supply to consumers reached by petitioner's railway system; that railway facilities, such as the proposed spur track was designed to furnish, were necessary to the successful operation of such an industry, and to the convenience of the petitioner in the public business of furnishing shipping facilities for the handling of ice; and that the petitioner invoked the statutory power given to railroads to acquire rights of way for spur tracks in good faith intending to devote the property, when acquired, to the public use declared by the statute. In this we state the effect of the findings of fact upon which the conclusion of the circuit court rests. We are unable to come to the conclusion that the evidence upon which they were found clearly preponderates against them. True, the evidence shows that the proprietors of a single ice industry, by promising to furnish a large amount of ice for transportation over the petitioner's road, and to bear a large part of the expense of establishing the spur track, influenced respond-

ent to undertake such establishment; but it also shows, or tends to show, that respondent intended to make the track a part of its railway system, to control it exclusively, and operate it the same as it operates any other part of such system, acknowledging the right of all persons to be served by the facility for handling ice thus afforded, without discrimination." (112 Wisconsin, 6, 7.)

It seems clear that in this case, which is the only one which has arisen under section 1831a, the railway company, the circuit court and the supreme court of Wisconsin deemed it necessary that something more should be shown than that the necessity of a particular ice industry required a spur track and that it must be made to appear under section 1831a that the track was needed by the railway "in the public business of furnishing shipping facilities," and that it was the intention of the railway company to use the track when constructed in the discharge of its public duties.

There is no such showing in the instant case either by pleading, evidence or finding, and the statute in question does not require it.

Again in the Morehouse case the Wisconsin supreme court distinguishing that case from *Railroad Company v. Iron Works*, 31 West Virginia, 710, quoted from the opinion in the latter case as follows:

"Through the disguises thrown around the case of the petitioner the only purpose discoverable other than the private gain of the petitioner is the private gain of the owners of the particular industry whose place of business the petitioner intended to reach by the spur track."

And thereupon said:

"The case is of little or no weight in solving the proposition now presented, it appearing here that the purpose of respondent was to construct and operate a spur track reaching from a main railway track to a large industry such spur track to form an integral part of its railway system and to be operated so as to facilitate the transportation of ice for all persons desiring such service, without discrimination." (112 Wisconsin, 7, 8.)

And the Wisconsin court further said of section 1831a:

"The law contemplates only branch tracks leading off from main railway tracks, such branch tracks to be constructed and

operated as a part of an entire railway system for the transportation of freight to and from particular points reached thereby." (112 Wisconsin, 6.)

There is therefore no warrant either in the language of section 1831a or in the pleadings, evidence, findings or decision of the Morehouse case for the contention that that statute authorizes the construction of a spur track upon a showing only that such spur track is practically indispensable to the successful operation of some industry or enterprise.

4. Mr. Attorney General says of the act of 1907:

"The conditions prescribed, to-wit: that the facility be practically indispensable to the successful operation of an industry or enterprise * * * * are neither more nor less than a legislatively declared measure of what is reasonable, as to this class of railroad facilities." (Brief page 6.)

Regarding the statute in this light, it is condemned by the decision of this court in *Railway Company v. Nebraska*, 217 U. S., 196. In that case this court, while affirming the doctrine that railroads may be required to fulfil the purposes for which they are chartered and provide reasonably adequate facilities therefor without compensation, held void a Nebraska statute requiring railroads to construct upon their own right of way switch tracks to elevators adjacent thereto, even if that statute were to be construed as requiring the building of such tracks only when reasonably demanded, and even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator. In its opinion this court said:

"This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs, and, possibly, without regard to place. It is true that in the first of the present cases the Supreme Court of Nebraska discussed the circumstances and expressed the opinion that the demand was reasonable and that building the side-track would not cast an undue burden upon the road; and, in the second, it somewhat less definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed as, by implication, confining their requirements to reasonable demands.

On the face of it the statute seems to require the railroad to pay for sidetracks, whether reasonable or not—or, if another form of expression be preferred, to declare that a demand for a sidetrack to an elevator anywhere is reasonable, and that the railroads must pay. Clearly no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power.

"But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections?" (217 U. S., 207.)

It is undeniable that railroads may be required to furnish at their own expense such trackage facilities as are necessary to the discharge of their duties as common carriers; that is to say, as are necessary for the public use, and for that purpose they may acquire by condemnation whatever land is necessary. If it be true as contended by the attorney general that the act of 1907 is a valid legislative declaration of what is reasonable as respects the construction of spur tracks, the legislature might have required the railroads to bear the expense. The case above cited is squarely in point against such a requirement, and if the railroad could not be required to furnish such facilities at its own expense because such facilities are not "incident to their public duty, but after all are private connections" it cannot take the land of others therefor.

II.

The case of *Illinois Central Railway Company v. East Sioux Falls Quarry Company*, 144 Northwestern Reporter, 727 (January 23, 1914) cited by counsel for the defendant in error, Chicago & Northwestern Railway Company, was decided under a statute of South Dakota not essentially different from section 1831a of the Wisconsin Statutes. The South Dakota Statute, section 505 C. C., provides:

"Every railroad corporation incorporated under this act and any railroad corporation authorized to construct, operate or maintain a railroad within this state, has power and is authorized * * * * to take, hold and appropriate so much real

estate as may be necessary for the location, construction and convenient use * * * * of switches, sidetracks * * * *"

Of this statute the South Dakota Supreme Court said:

"Under section 505 a railroad corporation otherwise authorized has full authority *for public use* to condemn property for each and every purpose mentioned in section 505, and for no other purpose, * * * * such spur track being considered, like a switch or sidetrack, mere incidents of the established line, and to be put in whenever there is public use for the same." (144 Northwestern Reporter, 727, 728.)

The italics in the above quotation are those of the South Dakota court.

After thus placing a construction upon the statute the court proceeded to determine whether the particular track upon the evidence in the case was in fact to be constructed for public use, and finding that it was, held that right of way might be condemned therefor.

The decision of the South Dakota Supreme Court places the same construction upon the statute of that state which we claim the Wisconsin court put upon section 1831a in the Morehouse case, viz.: That railway companies may construct spur tracks and condemn land therefor when necessary or convenient to the discharge of their duties as public carriers. Neither in the South Dakota statute nor in the decision cited is there any reference to the necessity of any industry for a spur track as a factor in determining whether such track may or shall be built.

Counsel for defendant in error, Chicago & Northwestern Railway Company, argues that the track here in question if built will be open for the use of the public; that purchasers of stone, vendors of machinery and tools, the doctor, the neighbor, the mail carrier, the solicitor seeking business, and the ubiquitous politician seeking votes, may use it, and from this concludes that the construction of the track is for public use. This is reasoning backward. The fallacy of it is that the statute authorizing the condemnation does not make the need or the convenience of these people who might be said to constitute, or at least represent the public, the controlling test for determining

whether the track shall be built, but in express terms declares that it must be built whenever practically indispensable to the successful operation of some industry, whether purchasers of products such as those which the industry produces, or vendors of machinery or tools or materials such as it uses, or doctors, or neighbors, or mail carriers, or solicitors, or politicians, have need of the track or not.

None of the briefs filed in behalf of defendants in error meet the contention that the statute prescribes an illicit basis for the exercise of the power of eminent domain. They all assume that the track when built will be open to the use of all of the public upon equal terms, though the statute nowhere so declares but on the contrary provides that those who desire to use it must contribute to its cost, and upon this assumption they contend that the public use underlies the right to build, while the statute in clear terms commands the building whenever indispensable to a private industry and is silent regarding any public use.

In the instant case there is no reference whatever to public use either in the pleadings, the proofs, the findings or the judgment, and the facts found show that the track lying wholly upon private land cannot be reached by the public.

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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 529.

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UNION LIME COMPANY,

Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR ON MOTIONS TO DISMISS OR AFFIRM OR TRANSFER TO SUMMARY DOCKET

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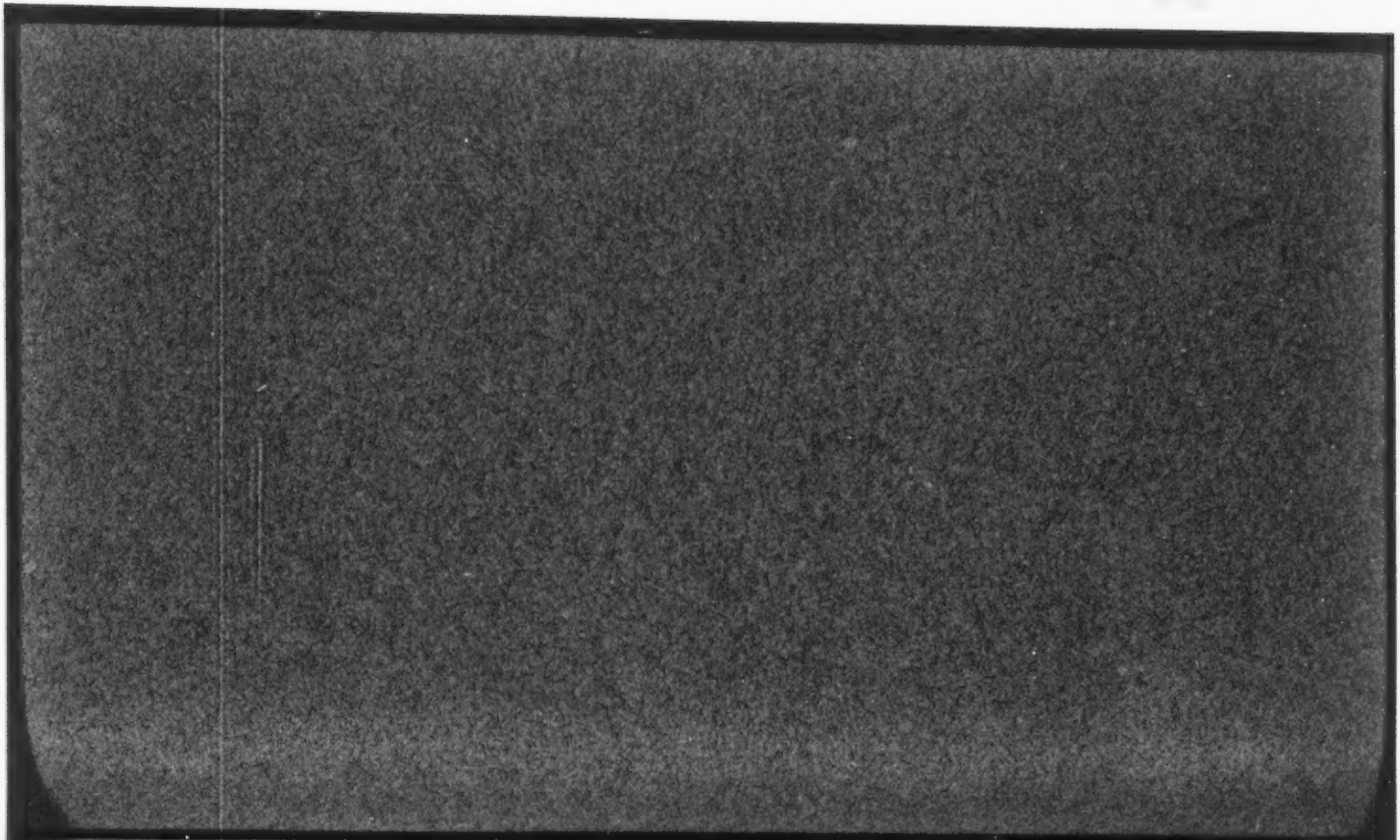

Subject Index.

	Page
Appeal to Wisconsin Supreme Court	12
Argument	14-25
Circuit Court Proceedings—	
Petition	6-8
Answer	8-9
Findings	9-11
Judgment	12
Condemnation for Private Use	17-25
Defendant's Motions to Dismiss, etc	1-2
Grounds for Opposing Motions	2
Issue Stated	13
Jurisdiction of this Court	15
Motions made by one Defendant	14
No color for Motion to Dismiss	16
Opinion of Wisconsin Supreme Court	12
Proceedings before Railroad Commission—	
Petition	6
Order	6
Questions not Frivolous	17-25
Statement of the Case	3-13
Statute Must Show Public Use	23
Wisconsin Statutes—	
Sec. 1802	3
Sec. 1831a	3
Sec. 1797-1 to 1797-38	4
Sec. 1797-11m	4
Sec. 1797-12n	5
Writ Not Sued Out for Delay	17

Index of Cases.

	Page
Atty. Gen. v. Eau Claire, 37 Wisconsin 437-8	24
Clark v. Nash, 198 U. S., 361	19, 20
Cole v. La Grange, 113 U. S., 1	15, 21
Davidson v. New Orleans, 96 U. S., 97	15
Davies v. Corbin, 113 U. S., 687	16
Drainage Dist. v. Shrorer, 145 Indiana, 572	24
Eubank v. Richmond, 226 U. S., 137	15
Fallbrook District v. Bradley, 164 U. S., 112	15, 19
Fleming v. Hull, 73 Iowa, 598	24
Hairston v. Railway Company, 208 U. S., 598	17, 18
Insurance Company v. Railway Company, 175 U. S., 91	15
Kaukauna Co. v. Canal Co., 142 U. S., 254	21
Lime Company v. Railroad Com., 144 Wisconsin, 523	13
Lime Company v. Railway Co., 152 Wisconsin, 633	12, 20
Loan Association v. Topeka, 20 Wallace, 655	15, 21
Matter of Tuthill, 163 New York, 133	23
Murray v. Hoboken Co., 18 Howard, 272	15
New Orleans v. Construction Co., 129 U. S., 45	16
Nickey v. Stearns Co., 126 California, 150	24
Railway Company v. Carson, 194 U. S., 136	16
Railway Company v. Morehouse, 112 Wisconsin, 1	25
Railway Company v. Nebraska, 164 U. S., 403	15, 21
Railway Company v. Nebraska, 217 U. S., 196	15, 22
Railway Company v. Stock Yards Co., 212 U. S., 132	23
Reeves v. Wood County, 8 Ohio State, 333	23
School District v. Hall, 106 U. S., 428	16
Strickley v. Mining Company, 200 U. S., 527	19, 21
Theresa Drainage District, 90 Wisconsin, 304-5	24
Wallman v. Connor Company, 115 Wisconsin, 617	24
Whitney v. Cook, 99 U. S., 607	16
Wilkinson v. Leland, 2 Peters, 627	15

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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR ON MOTIONS OF EDEN INDEPENDENT LIME & STONE COMPANY TO DISMISS THE WRIT OF ERROR OR AFFIRM THE JUDGMENT OF THE STATE COURT OR TRANSFER THE CAUSE TO A SUMMARY DOCKET.

This cause comes to this court upon writ of error to review the decision and judgment of the supreme court of the state of Wisconsin affirming an order or judgment of the circuit court of Fond du Lac County in said state adjudging that the defendant in error, Chicago & Northwestern Railway Company, is entitled to take certain real estate belonging to the plaintiff in error for the purpose set forth in the petition of said railway company.

The cause being duly docketed, defendant in error, Eden Independent Lime & Stone Company, has filed motions (1) to dismiss the writ of error on the ground that this court has no

jurisdiction or, (2) to affirm the judgment of the state court on the ground that it is manifest that the writ of error was taken for delay, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument; or (3) in case both of the above motions are denied that the cause be transferred to a summary docket.

Plaintiff in error contends that these motions should be denied for the following reasons:

1. All of the motions should be denied because made by only one defendant in error without any showing that the other defendant in error has been requested or has refused to join therein, or is not interested in the result of the cause, or is acting in collusion with the plaintiff in error, or otherwise in bad faith.

2. The motion to dismiss should be denied because the record clearly presents a question within the jurisdiction of court, to-wit: Whether a statute of the state of Wisconsin under and pursuant to which the judgment of the state court was rendered and upon the validity of which that judgment depends is in conflict with the 14th amendment to the constitution of the United States.

3. The motion to affirm should be denied (a) because there is no color for the motion to dismiss; and (b) because the precise question presented has never been decided by this court adversely to plaintiff in error, is not frivolous but serious and important, and there is no evidence that the writ of error was sued out for delay.

4. The motion to transfer the cause to a summary docket should be denied because the question presented by the record is an important one, which involves the validity of a state statute and affects valuable property rights of the plaintiff in error and deserves full argument; while delay until the case can be heard in its regular order will not suspend or embarrass the operations of the state or any of its departments, subdivisions or officers, and the moving defendant in error is protected by an ample bond approved by the chief justice of the state who granted the writ of error.

STATEMENT OF THE CASE.

In the statement and argument contained in the brief of counsel in support of these motions, the issue before the court in this cause is so obscured by the introduction of matter which is irrelevant and extraneous to the record that we deem it necessary to make a somewhat full statement of the case to the end that the real question involved may be clearly apparent.

For some years prior to 1907 the statutes of the state of Wisconsin contained the following, and no other provisions relating specially to the construction of spur or switch tracks from railroads to reach private industries:

Section 1802. "The owner of any elevator, warehouse, manufacturing plant or mill, or of any lumber, coal or wood yard located within one-half mile of any railroad or any sidetrack thereof may, at his own expense construct a spur track from any such elevator, warehouse, manufacturing plant, mill or yard to a point on the right of way within the terminal or yard limits of any such railroad and the railroad shall connect the same with its tracks within such terminal or yard limits. * * * * such spur track shall at all times be under the control and management of and be kept in repair and operated for such owner or his assigns by such railroad, but the actual cost of so maintaining and operating shall be paid monthly by the owner thereof, and in case of neglect to so pay the same upon demand the obligation of this section upon any such railroad shall cease until such charges are paid. * * * *"

Section 1831a. "Every railway company existing in whole or in part under any law of this state and operating a railway therein may build, maintain and operate branches and spur tracks from its road or any branch thereof to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise, with all sidetracks, storage tracks, wyes, turnouts, and connections necessary or convenient to the use of the same; and every such company may acquire by purchase or condemnation in the manner provided in this chapter for the acquisition of real estate for railway purposes, other than for its main track, all necessary roadways and rights of way for such branches, spur tracks, sidetracks, storage tracks, wyes, turnouts, and connections; and every such company may also acquire, in the same manner, such depot grounds, yards, grounds for roundhouses, machine shops, warehouses,

storehouses, elevators, docks, wharves and piers as may be necessary and convenient for the enjoyment and use of its road. * * *"

Sections 1797-1 to 1797-38 inclusive of the Wisconsin Statutes enacted in 1905 created a Railroad Commission with broad powers of control over the rates, regulations and service of railroads within the state and to compel the performance of all their public duties. Section 1797-3 provided among other things that "every railroad is hereby required to furnish reasonably adequate service and facilities," and other sections of the act established suitable procedure and gave to the commission ample power by order to enforce this mandate of the statute.

In 1907 the state legislature without repealing or amending any of these statutes, all of which are still in effect, passed chapter 352 of the Laws of 1907 creating two new sections of the statutes to be known as sections 1797-11m and 1797-12n which, with amendments adopted in 1909 and 1911, but not here material, read as follows:

Section 1797-11m. 1. "Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain, and operate a reasonably adequate and suitable spur track, *whenever such spur track* does not necessarily exceed three miles in length, *is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise*, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest.

2. Such railroad may require the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of *acquiring, by condemnation or purchase, the necessary rights of way for such spur track*, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; provided however that when any such person, firm, corporation or association, shall be required by the commission to deposit with the railroad, the total estimated cost, as herein provided, such person, firm, corporation or association, may offer or cause to be offered, a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such rail-

road, and conditioned upon the construction of such spur track in a good and workmanlike manner, according to the plans and specifications provided by such railroad, and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and surety company bond shall be offered the person, firm, corporation or association primarily to be served thereby, shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation, or association primarily to be served thereby, shall give the railroad a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expense incurred beyond the amount so deposited with the railroad.

3. Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation, or association shall be required to pay to the person, firm, corporation, or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof, to be determined by the commission, upon such application and notice, to the persons, firms, corporations, or associations that have paid or contributed toward the original cost and expense of acquiring the right of way and constructing the same."

Section 1797-12n. "In case of the failure or refusal of any railroad to comply with any of the provisions of sections 1797-11m and 1797-12n, the person or persons, firm, corporation or association aggrieved thereby may file a complaint with the railroad commission setting forth the facts, and the said commission shall investigate and determine the matter in controversy, in accordance with the provisions of sections 1797-1 to 1797-28 inclusive, and any order it shall make in said proceeding shall have the same force and effect as an order in any other proceeding properly begun under and by virtue of the provisions of said sections."

On April 26, 1911, these statutes being in force the defendant in error, Eden Independent Lime & Stone Company, filed a petition with the Railroad Commission of Wisconsin under section 1797-12n praying that the defendant in error, Chicago & Northwestern Railway Company, be ordered and required to construct a spur track westerly from the terminus of one of the tracks shown on a map annexed to the petition to the plant and premises of said petitioner company. (Transcript 10 and 18.) A substantial copy of this map is contained in the transcript on which the proposed new track is marked in yellow.

Such proceedings were had before the Railroad Commission that on June 30, 1911, that body made the following order:

"It is therefore ordered, That the Chicago & Northwestern Railway Company construct a suitable sidetrack as prayed for by the petitioner herein, along the route designated by the blue print attached to the original petition, which sidetrack shall be an extension of the railway company's track marked 'D' on said blue print.

"It is further ordered, That the petitioner herein deposit with the Chicago & Northwestern Railway Company the sum of one thousand six hundred and sixty dollars ($1,660) the estimated cost of the proposed extension, and in addition thereto the sum of two hundred dollars ($200) *to cover the portion of the right of way which has to be acquired by condemnation or otherwise;* and also give the railroad company a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expense incurred beyond the amount of the deposit with the railroad.

"Sixty days is deemed a reasonable period of time within which to comply with the provisions of this order. If for any valid reason compliance with the order cannot be made within such time the commission will extend the same upon application." (Transcript 16.)

Thereafter and on September 7, 1912, the defendant in error, Chicago & Northwestern Railway Company, filed its petition in the circuit court of Fond du Lac County, Wisconsin, praying that it might be determined that it was entitled to take certain lands of the plaintiff in error therein described for the

purpose of constructing said spur or switch track as ordered by the Railroad Commission.

In addition to describing the property sought to be taken and alleging other matters not here material, the petition of the railway company set forth the application of the Eden Company to the Railroad Commission and the proceedings before that body, and thereupon averred:

"That on the 30th day of June, 1911, in said proceeding, it was, by said Railroad Commission of Wisconsin, determined and ordered as follows:

"1. That a spur track connecting, at its eastern terminus with the western terminus of said track designated on the annexed map as 'Loading Track,' and running thence westerly to the plant and premises of said Eden Independent Lime & Stone Company (as marked in yellow upon the annexed map), *is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime & Stone Company;* that its construction and operation are not unusually unsafe or dangerous; that it is not unreasonably harmful to public interest.

"2. That the Chicago & Northwestern Railway Company, your petitioner, construct a suitable sidetrack, as prayed for by said Eden Independent Lime & Stone Company, along the route so designated as aforesaid, which said sidetrack should be an extension of your petitioner's track, marked and designated on the annexed map as 'Loading Track.'

"3. That said Eden Independent Lime & Stone Company perform and do certain things conditions precedent to the construction of said track.

"Petitioner further alleges that said Eden Independent Lime & Stone Company has complied with the terms and conditions of said order, and *your petitioner hereby pleads the said proceedings, and the said order and determination therein, and the conditions performed by said Eden Independent Lime & Stone Company, as the necessity for the taking and condemning of the property and premises herein sought to be taken and condemned.*" (Transcript 10-11.)

There was no other allegation in the petition of the use or purpose for which condemnation of the land was sought or of right to condemn, and no allegation that it was required for or intended to be used for general railway purposes or other public use, but it was alleged:

"That it is the intention of said corporation, the petitioner, in good faith, to use said real estate sought to be acquired in this proceeding for the uses and purposes herein set forth." (Transcript 11-12.)

In its answer to the Railway Company's petition the plaintiff in error admitted all the facts alleged therein.

It further alleged that the existing spur track with its branches, switches and sidings were constructed many years ago under agreements between the predecessor in title of the petitioning Railway Company and the predecessor in title of plaintiff in error and an adjacent land owner, the Nast Brothers Lime & Stone Company, "and have since construction and hitherto been used in serving the plants and business of said last mentioned companies and no other plants or business, and that the plants of this defendant and of said Nast Brothers Lime & Stone Company have been constructed and arranged with reference to the use of and service afforded by said existing spur track and the branches, switches and sidings thereto." (Transcript 13.)

It further alleged that the petition of the Eden Company to the Railroad Commission was filed April 26, 1911; that it was so filed and the proceedings thereon were had and the order of the commission made "solely and exclusively under and pursuant to the provisions of" sections 1797-11m and 1797-12n, above quoted, "and that said Railroad Commission of Wisconsin had no authority or power to receive and consider said petition or to entertain the said proceedings or to make or enter the said order, except as power so to do was and is conferred by said above mentioned statutes." (Transcript 13-14.)

The answer of plaintiff in error further alleged that the Eden Company was a private corporation existing solely for pecuniary profit of its stockholders; that the proposed sidetrack will begin upon land of the plaintiff in error and terminate upon land of the Eden Company, and throughout its course extend and be laid entirely over and upon lands of the Eden Company and plaintiff in error and not be accessible at any point by or from any existing public highway or accessible by

the public generally or by any one except said Eden Company and plaintiff in error without crossing lands of one or the other of them. (Transcript 14.)

The answer further alleged that the use for which the lands were sought to be taken was a private and not a public use; that such taking, the said order of the Railroad Commission requiring the construction of the said sidetrack and the acquisition of lands therefor and the above quoted statutes pursuant to which said order was made would deprive plaintiff in error of its property without due process of law and deny to it the equal protection of the laws contrary to the provisions of the fourteenth amendment to the constitution of the United States. (Transcript 14-15.)

When the case came on for hearing before the circuit court of Fond du Lac County neither party offered any evidence, but the petitioning Railway Company moved the court for judgment upon the pleadings (Transcript 17), thus admitting all the facts alleged in the answer of plaintiff in error. This motion was granted and thereupon the court entered an order, which under the Wisconsin practice has the force of a judgment, and in which by way of recital and in the nature of findings of fact and conclusions of law the court restated substantially all of the allegations of fact in both petition and answer and its legal conclusions therefrom. Of the findings so made, the following are material to the present controversy:

FIRST. "That prior to June 30, 1911, said Eden Independent Lime & Stone Company petitioned the Railroad Commission of Wisconsin, in writing, praying, in substance, that the Chicago & Northwestern Railway Company, the petitioner herein, be ordered and required to construct a spur track westerly from the terminus of one of the tracks shown on the map annexed to the petition, to the plant and premises of said petitioner company, and that a day be set for hearing on said petition, and that the officers of the Chicago & Northwestern Railway Company and of the Union Lime Company and Nast Brothers Lime & Stone Company, be cited to appear at said hearing; that a day for hearing was so fixed, and that all of said companies were cited to and did appear, and thereafter, after full hearing on said petition, in which all parties so cited to appear took part, the matter of said petition was submitted

to said Commission for its determination." (Transcript 18.) The Eden Company's petition was filed April 26, 1911. (Transcript 20.)

SECOND. "That on the 30th day of June, 1911, in said proceeding, it was, by said Railroad Commission of Wisconsin, determined and ordered as follows:

"1. That a spur track connecting, at its eastern terminus with the western terminus of said track designated on the map annexed to the petition as 'Loading Track,' and running thence westerly to the plant and premises of said Eden Independent Lime & Stone Company (as marked in yellow on the map annexed to the petition), *is practically indispensable to the successful operation of the lime kiln and quarry of said Eden Independent Lime & Stone Company;* that its construction and operation are not unusually unsafe or dangerous; that it is not unreasonably harmful to public interest.

"2. That the Chicago & Northwestern Railway Company construct a suitable sidetrack, as prayed for by said Eden Independent Lime & Stone Company, along the route so designated as aforesaid, which said sidetrack should be an extension of the track of Chicago & Northwestern Railway Company, marked and designated on the map annexed to the petition as 'Loading Track.'

"3. That said Eden Independent Lime & Stone Company perform and do certain things conditions precedent to the construction of said track." (Transcript 18-19.) A copy of the order of the Railroad Commission is printed *supra*, p. 6.

THIRD. "That said Eden Independent Lime & Stone Company has complied with the terms and conditions of said order." (Transcript 19.)

FOURTH. "That it is necessary to take and condemn the property and premises herein described for the purposes set forth in the petition." (Transcript 19.)

FIFTH. "That it is the intention of said corporation, the petitioner, in good faith to use said real estate sought to be acquired in this proceeding, for the uses and purposes herein set forth." (Transcript 19.)

SIXTH. "That the existing spur track, together with the branches, switches and sidings, were constructed many years ago under and pursuant to agreement between the predecessor in title of the petitioner on the one part, and the predecessor in title of the Union Lime Company and Nast Brothers Lime & Stone Company of the other part, and have since construction and hitherto, been used in serving the plants and business of said last mentioned companies, and no other plants or business, and that the plants of the Union Lime Company and the said

Nast Brothers Lime & Stone Company have been constructed and arranged with reference to the use and service afforded by said existing spur track and branches and switches and sidings thereto." (Transcript 19-20.)

SEVENTH. "That the proceedings before the Railroad Commission referred to and described in the petition herein, and the order finally made and entered therein, were had, made and entered solely and exclusively under and pursuant to the provisions of chapter 352 of the laws of Wisconsin for the year 1907, as amended by chapter 481 of the laws of Wisconsin for the year 1909 (the same now being sections 1797-11m and 1797-12n of the Wisconsin Statutes), and that said Railroad Commission of Wisconsin had no authority or power to receive and consider said petition, or to entertain the said proceedings, or to make or enter the said order, except as power so to do was and is conferred by said mentioned statutes." (Transcript 20.)

EIGHTH. "That the said Eden Independent Lime & Stone Company was organized and exists as a corporation for the purpose of engaging in the business of operating stone quarries and lime works and manufacturing, selling and dealing in lime and other building material, and was and is a private corporation organized and existing solely for the pecuniary benefit and profit of its stockholders." (Transcript 20.)

NINTH. "That the proposed sidetrack will begin upon the land of the Union Lime Company and terminate upon the land of said Eden Independent Lime & Stone Company, and throughout its course will extend and will be laid entirely over and upon the lands of the said two companies, and will not be accessible at any point by or from any existing public highway, and cannot be reached by the public generally, or by any one except said Eden Independent Lime & Stone Company and the Union Lime Company, without crossing lands of either of said companies." (Transcript 20.)

TENTH. "That the use for which said land is sought to be taken and condemned is a public use, and that such taking will not deprive the Union Lime Company of its property without due process of law, or violate any provision of the Constitution of the United States or any amendment thereof." (Transcript 20.)

ELEVENTH. "That the statutes of the state of Wisconsin, hereinbefore referred to, are valid, and not violative of any provision of the United States Constitution, or any amendment thereof, or of the Constitution of the state of Wisconsin, or any amendment thereof, and the said Railroad Commission of Wisconsin had power and authority to entertain the said proceedings and make said ordeer." (Transcript 20.)

The material parts of the order or judgment of the circuit court based upon the foregoing findings, which, as before said, were incorporated therein by way of recital, are as follows:

"Ordered, adjudged and determined, That all of the real estate described in the petition herein, and sought to be acquired by this proceeding, and hereinbefore described in this order, is required for the purposes set forth in the petition herein, and is necessary and convenient for such purposes, and is necessary for public use.

"It is further ordered, adjudged and determined, That said petitioner Chicago & Northwestern Railway Company is entitled to take the whole of the real estate described in said petition, and sought to be acquired in this proceeding, and hereinbefore described in this order." (Transcript 20-1.)

In the order the court also appointed three commissioners to appraise the compensation to be made for the land taken.

From this order or judgment the plaintiff in error appealed to the supreme court of Wisconsin, and after the cause reached that court the defendant in error Eden Company on its own application was allowed to intervene.

The state supreme court affirmed the judgment of the circuit court and in its opinion (filed March 11, 1913, and reported in 152 Wis., 633) said:

"The Eden Independent Lime & Stone Company, intervenor, asserts that the order appointing commissioners for condemnation of the lands specified in the petition, pursuant to the order of the Railroad Commission, is proper and valid. The appellant the Union Lime Company asserts the order is invalid and void, upon the ground that sections 1797-11m and 1797-12n, Statutes, under which the order was made, are unconstitutional, for the reason that these statutes attempt to confer authority on the Railroad Commission to authorize the taking of appellant's property for a private use; and because the taking of appellant's land, under the petition of the railway company herein, as ordered by the lower court, is for a private use, therefore denies the appellant the equal protection of the laws, and is contrary to the 14th amendment to the constitution of the United States. The trial court held that the use for which appellant's land 'is sought to be taken and condemned is a public use, and that such taking will not deprive the Union Lime Company of its property without due process of law, or violate any provision of the constitution of the United States

or any amendment thereof.' The court held that the statutes above referred to did not in any of their provisions conflict with the provisions of the United States or state constitutions, and that the Railroad Commission of Wisconsin had power and authority to entertain the proceeding, and to make the order heretofore referred to.

"The appellant on this appeal asserts no error save the contention that sections 1797-11m and 1797-12n, Statutes, are void because they violate the provisions of the 14th amendment to the federal constitution. In the case of *Union Lime Co. v. Railroad Commission,* 144 Wis., 523, 129, N. W., 605, this appellant raised the same question on the appeal to this court, in an action to set aside the Railroad Commission's order to have the appellant's property condemned for a spur track, and this court declared the statutes constitutional.

The railway company instituted this proceeding to condemn the appellant's property for railroad purposes, as directed in such order of the Railroad Commission. An examination of the questions as presented on this appeal discloses no new grounds or reasons which impeach the correctness of the conclusions announced in the decision on this question then before us, nor is anything submitted now which in our view suggests that these statutes conflict with any of the provisions of the United States or state constitutions, or any amendment thereof. We do not deem it necessary in the instant case to repeat the considerations which form the basis of the decision in the former case, and it suffices to say that the questions presented on this appeal are ruled by that case, and hence the order appealed from must stand." (Transcript 25-6.)

In accordance with the views thus expressed in its opinion the supreme court of Wisconsin on March 11, 1913, affirmed the order or judgment of the circuit court and it is to review this judgment of the supreme court that this writ of error has been sued out.

THE ISSUE.

From the foregoing summary of the record it is apparent that the only controverted question presented by the pleadings in this cause is, as stated by the supreme court of Wisconsin, whether "Sections 1797-11m and 1797-12n, Statutes (of Wisconsin) are void because they violate the provisions of the 14th amendment to the federal constitution."

That was the only issue decided by the findings and judgment of the circuit court of Fond du Lac County and by the judgment and decision of the supreme court of Wisconsin in affirming the judgment of the lower court and is the only issue raised by the pending writ of error.

The answer to that question depends upon whether under the 14th amendment private property can be taken under the power of eminent domain for the construction of a spur track "whenever such spur track * * * is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise," as is provided in sub-section 1 of section 1797-11m Wisconsin Statutes.

It is claimed by the plaintiff in error that this subsection, which is the vital part of the act of 1907, violates the 14th amendment in that it prescribes as a test for the taking of private property not that it is required for public use, but that it is indispensable to the successful operation of some private industry or enterprise.

ARGUMENT.

I.

ALL OF THE MOTIONS SHOULD BE DENIED BECAUSE MADE BY ONLY ONE DEFENDANT IN ERROR.

These motions are made by the defendant in error, Eden Independent Lime & Stone Company, alone, the defendant in error, Chicago & Northwestern Railway Company, not joining therein. There is no showing that the Railway Company was ever asked to join in the motions, or ever refused so to do, nor is there any showing that the Railway Company is not acting in entire good faith or has not diligently prosecuted this action in attempted compliance with the order of the Railroad Commission of Wisconsin. It is alleged in its petition and found by the circuit court of Fond du Lac County:

"That it is the intention of said corporation, the petitioner, in good faith to use said real estate sought to be acquired in this proceeding for the uses and purposes herein set forth.

"That the petitioner has actually surveyed its route over the land sought to be acquired for said spur track and has actually staked out the center line of said proposed spur track." (Transcript 19.)

Neither has there been any delay on the part of the Railway Company or of the plaintiff in error. The petition commencing the action was filed in the circuit court of Fond du Lac County September 7, 1912. Judgment was entered in that court September 28, 1912, and the cause was decided in the supreme court of Wisconsin March 11, 1913. The Railway Company is a party allied in interest with the Eden Company and we submit that the motions separately made by the latter should not be entertained.

II.

JURISDICTION OF THIS COURT.

It is too plain to require argument that this court has jurisdiction of this cause under section 237 of the judicial code.

The taking by a state of the private property of one person or corporation without the owner's consent for the private use of another under the power of eminent domain, or of taxation, or the police power, or any other power, is not due process of law, and is a violation of the 14th amendment of the constitution of the United States.

Wilkinson v. Leland, 2 Peters, 627, 658.
Murray v. Hoboken Co., 18 How., 272, 276.
Loan Assn. v. Topeka, 20 Wall., 655.
Davidson v. New Orleans, 96 U. S., 97-102.
Cole v. La Grange, 113 U. S., 1.
Fallbrook Dist. v. Bradley, 164 U. S., 112, 158, 161.
Ry. Co. v. Nebraska, 164 U. S., 403, 417.
Ins. Co. v. Ry. Co., 175 U. S., 91.
Ry. Co. v. Nebraska, 217 U. S., 196.
Eubank v. Richmond, 226 U. S., 137.

In the 5th, 6th and 7th paragraphs of its answer to the petition of the Railway Company in the circuit court of Fond du Lac County, and in the state supreme court, the plaintiff in error specifically set forth and claimed that the statute in question violates the 14th amendment in this respect. The decisions of both the circuit court and supreme court of Wisconsin were in favor of its validity, and the case was decided in both courts adversely to the plaintiff in error solely upon this question The jurisdiction of this court being clear, the motion to dismiss should be denied.

III.

THERE IS NO COLOR FOR THE MOTION TO DISMISS AND CONSEQUENTLY THE ALTERNATIVE MOTIONS SHOULD NOT BE ENTERTAINED.

Where motions are made to dismiss or affirm, the motion to affirm will not be entertained unless there is color for the motion to dismiss.

Whitney v. Cook, 99 U. S., 607.
School District v. Hall, 106 U. S., 428.
Davies v. Corbin, 113 U. S., 687.
New Orleans v. Construction Co., 129 U. S., 45.
Railway Co. v. Carson, 194 U. S., 136.

By color for a motion to dismiss, we understand is meant reasonable ground for difference of opinion as to whether jurisdiction exists, so that a fair argument can be made that it does not. No such argument can be made in this case. The jurisdiction is too clear to be debatable. There is therefore no color for the motion to dismiss, and for that reason the motion to affirm should not be entertained.

While we have not found the point expressly passed upon in any reported case, we also submit that under paragraph 6 of rule 6 the want of color for the motion to dismiss prevents consideration of the motion to transfer to a summary docket.

IV.

IT IS NOT MANIFEST THAT THE WRIT WAS TAKEN FOR DELAY ONLY OR THAT THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPEND ARE SO FRIVOLOUS AS NOT TO NEED FURTHER ARGUMENT OR THAT THEY ARE OF SUCH A CHARACTER AS NOT TO JUSTIFY EXTENDED ARGUMENT.

It is not suggested by counsel for the moving defendant in error that the record supports the contention that the writ of error was sued out for delay unless it be on the ground that the questions presented are frivolous or of such a character as not to require argument at the bar. We do not deem it necessary or proper on these motions to enter upon a full discussion of the questions raised by the record and shall attempt no more than to show that they are worthy of further and full argument.

In *Hairston v. Railway Company*, 208 U. S., 598, 607, this court said:

"No case is recalled where this court has condemned as a violation of the 14th amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. * * * * We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by right of eminent domain."

We earnestly believe that the instant case is one in which this court, applying principles established in a long line of decisions, must decline to follow the state court. No such statute as that of Wisconsin which is here involved has ever been before this court for consideration as to its validity, and after diligent search we have been unable to find its parallel in any other state, or any principle of constitutional law upon which it can be sustained. The cases which have hitherto come to this court for review of the action of state courts in upholding the taking of private property under the power of eminent domain have been of two classes: (First) Those arising under general condemnation statutes, in which class of cases the question has been whether the facts of the particular case showed

a taking for some recognized public use; and (second) those arising under special statutes declaring the furtherance of some particular branch of industry to be a public use in aid of which the power of eminent domain may be exercised. None of the cases previously decided by this court have involved a statute which, like that of Wisconsin, declares that the power of eminent domain may be exercised to provide railroad facilities whenever practically indispensable to the successful operation of any existing or proposed industry or enterprise, though in many cases this court has denied that this power or the power of taxation can be exerted for similar purposes.

Neither of the above mentioned classes of cases is conclusive upon this, and the first is inapplicable, for in that class, to which belong most of the cases cited by the moving defendant in error, the proceedings were had under general statutes, and the question whether the taking was for a public use arose as a question of fact. In a number of these cases it has been held in substance that land may be taken for the construction of a spur track, notwithstanding that when built it may be of special advantage to private parties and may have been located with reference to its use by private parties, provided it is also intended and needed for public use and is so located that it can be used by the public. An example of this class of cases is:

Hairston v. Railway Co., 208 U. S., 598.

In that case the Railway Company sought condemnation of a strip of land upon which to lay a spur track which it alleged was needed for the enlargement of its facilities in serving the public generally in the reception and delivery of freight at an important station. It claimed that it had located the proposed track in the most available place, but conceded that it was influenced in making the location by the fact that thereby a large tobacco industry could be reached. The land owner contended that the record in that case which included all the evidence showed "unmistakably that the taking was for private uses, and that the claim by the Railway Company that the spur track was

designed in part for public uses is no better than a colorable pretense." (208 U. S., 605.)

Cases of this kind, of which a large number are cited in the brief of counsel for the moving defendant in error, are clearly not in point upon the question presented by the instant case.

Of the second class of cases—those arising under special statutes, declaring the furtherance of certain branches or kinds of industry to be a public use in aid of which the power of eminent domain may be exercised—leading examples are:

Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 112.
Clark v. Nash, 198 U. S., 361.
Strickley v. Mining Co., 200 U. S., 527.

The first of the cases just cited sustained a statute of California authorizing condemnation of lands by a corporation for the purpose of making reservoirs and digging ditches to supply land owners with water; the second upheld a statute of Utah as to one paragraph thereof which authorized condemnation by a private person of right of way for an irrigation ditch; and the third upheld another paragraph of the same Utah statute which the state court had held authorized the taking by a private corporation of land for an aerial railway to reach mines.

To these might be added a considerable number of decisions of state courts affirming the validity of similar statutes. Most of the statutes approved in these decisions have reference to the development of agriculture, or mining, or water powers, or the drainage of swamp lands, and all relate to some particular industry or industries which so affect the general welfare as to be matters of common interest, and are surrounded by such exceptional circumstances as to require the intervention of the state for their successful prosecution or development.

All decisions of this class in this court and most of those in state courts have been rested upon a doctrine which may be thus summarized: that what is a public use may frequently and largely depend upon the facts surrounding the subject; that there may be exceptional times and places in which the very

foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent; that in some localities considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare and the long established methods and habits of the people may justify regarding as public a use of property which would generally be considered private; and that under such circumstances the power of eminent domain may be rightfully exerted even to the extent of authorizing one person to take for his own use another's property.

This court is now asked upon motion and without argument at the bar, or after limited argument only, to extend this doctrine and hold it to be a public use to provide spur track facilities whenever the same are practically indispensable to the successful operation of any industry or enterprise existing or proposed, of whatever kind or character and of whatever magnitude, large or small. Such a sweeping declaration of public use can find support only in the theory that whatever contributes to the public interest by developing natural resources or promoting industrial enterprises will justify exercise of the power of eminent domain. This view seems to have influenced the supreme court of Wisconsin in upholding the statute in question, for in *Union Lime Company v. Railroad Commission*, 144 Wis., 523, in which case this statute and this particular spur track first came before that court, it is said (page 533):

"Over it the products of the industry find their way into the markets of the world and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof."

This court has never gone so far, but has always held a contrary doctrine.

In *Clark v. Nash*, *supra*, it is said:

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may

be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state."

In *Strickley v. Mining Company, supra,* commenting upon the decision in *Clark v. Nash,* this court said (page 531):

"While emphasizing the great caution necessary to be shown it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the 14th amendment which prevents a state from requiring such concessions."

A statute of Kansas authorizing the common council of a city to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve the city by appropriations from the general fund or the issuance of bonds was held void as authorizing the taking of private property for private use.

Loan Association v. Topeka, 20 Wallace, 655.

A similar statute of Missouri was held void upon the same ground.

Cole v. La Grange, 113 U. S., 1.

A state cannot take property under the power of eminent domain for the purpose of creating a water power to be leased for manufacturing purposes.

Kaukauna Company v. Canal Company, 142 U. S., 254, 273.

Nor can a state require a railway company which has permitted the erection of two elevators by private persons on its right of way at a station to grant upon like terms and conditions a location upon that right of way to other private persons for the purpose of erecting thereon a third elevator.

Railway Company v. Nebraska, 164 U. S., 403.

Nor can a state require a railway company to construct upon its right of way a spur track to reach an elevator on private land adjacent thereto.

Railway Company v. Nebraska, 217 U. S., 196.

The case last cited which arose under a Nebraska statute is directly in point upon the question presented here. The Nebraska statute differed from the one here involved in three particulars only: (1) The Nebraska act applied only to grain elevators, while the Wisconsin statute applies to any "industry or enterprise;" (2) the Nebraska act required construction of a switch or spur track only upon right of way already owned by the railway company, while the Wisconsin act requires the acquisition of new right of way; and (3) the Nebraska act imposed the cost of the switch or spur track upon the railroad company, while the Wisconsin act makes the industry or enterprise bear such cost.

These differences so far as they may be material but serve to weaken the Wisconsin statute as compared with that of Nebraska. Certainly it cannot be claimed that the requirements that spur tracks shall be built to any "industry or enterprise" instead of to grain elevators only, or that a new right of way shall be acquired instead of using one already possessed, or that the cost shall be borne by the industry or enterprise instead of by the railroad, have any tendency to show that lands taken for such purposes are for public use.

If, as held in the case cited, the railroad company cannot be compelled to build a side track entirely upon its own right of way to reach and serve an elevator adjacent thereto and pay the expense thereof because to do so would take the railroad property for private use and deprive it of its property without due process of law, *a fortiori*, it cannot be compelled to acquire a new right of way and build a spur track thereon to reach a remote grain elevator or other industry or enterprise, and it necessarily follows that if the railroad company cannot be compelled to acquire a right of way land cannot be taken without consent of the owner, whether the cost be borne by the

railroad company or by the industry or enterprise to be served. A railroad company may be compelled by statute to provide whatever facilities are necessary to the discharge of its duties to the public and whatever lands of private persons may be required for such purposes may lawfully be taken under the power of eminent domain. But a railroad company cannot be forced to provide facilities not required for the discharge of its duty and it cannot either under compulsion or of its own motion condemn lands for such facilities.

Counsel for the moving defendant in error seem to attach some importance to the finding of the circuit court of Fond du Lac County that the land proposed to be taken "is necessary for public use." (Transcript 21.) This finding cannot aid the judgment for several reasons: (1st) It is in the nature of a conclusion of law and the facts found by the court show that the proposed spur track is not intended to be used and cannot be used by any one except the Eden Company, for it is to be so located that no one else can have access to it without passing over the land of that company or of the plaintiff in error. (2d) The finding of public use is expressly based upon the assumed validity of the statute under which the proceedings were had. (3d) Even if it were shown that this particular side-track might be of public use, inasmuch as the condemnation proceedings are based entirely upon sections 1797-11m and 1797-12n, if those sections are invalid, condemnation proceedings under them cannot be sustained.

It is essential to the validity of any condemnation statute that it shall show upon its face that the use for which property may be taken under it is a public one. The law itself must save the parties' rights and not leave them to the discretion of the courts as such.

Railroad Company v. Stock Yards Company, 212 U. S., 132, 144.
2 Dillon Municipal Corporations (3d ed.) sec. 603.
Reeves v. Wood County, 8 Ohio State, 333
Matter of Tuthill, 163 New York, 133.

Gifford Drainage District v. Shrorer, 145 Indiana, 572; 44 N. E., 636.
Fleming v. Hull, 73 Iowa, 598; 35 N. W., 673.
Nickey v. Stearns Ranchos Co., 126 California, 150; 58 Pacific, 459.

The same doctrine is held by the Wisconsin court.

Attorney General v. Eau Claire, 37 Wisconsin, 437-8.
In re Theresa Drainage District, 90 Wisconsin, 304-5.
Wallman v. R. Connor Co., 115 Wisconsin, 617-620.

The Wisconsin statute is sweeping in its terms authorizing resort to the power of eminent domain in aid of the construction of a spur track whenever indispensable to the successful operation of any industry. If our view of this statute is correct, it permits the taking of private property for private use, and if this is so no action can be lawfully taken under it, even though in the particular case a public use might be found to exist.

Support for our construction of the statute is found in the fact that while by its terms the right to exercise the power of eminent domain is granted to the railway company concerned, yet inasmuch as those interested in the existing or proposed industry or enterprise to be served are given the means by application to the Railroad Commission with which to coerce the railway company into exercising the power granted to it, the statute in effect, though not in form, confers upon such persons the power of eminent domain to be exercised when their necessities demand, subject to no determination by any tribunal or in any manner that such exercise will be for the public use. That it was the intention to vest in persons controlling existing or proposed industries the power to compel the construction of spur tracks when necessary to the operation of such industries is further apparent from consideration of the statutes in force at the time the act of 1907 was passed. Under section 1802 of the Wisconsin Statutes, *supra*,

private parties then had the right, within certain limits, to construct sidetracks at their own expense, which railroads were required to maintain and operate in their behalf, but did not have the right to condemn right of way therefor. Under section 1831a *supra*, railroads were given the right to build spur tracks to reach and serve industries, but were not compellable so to do unless under the railroad commission law, which provided that "every railroad is hereby required to furnish reasonably adequate service and facilities, and under section 1831a the supreme court of Wisconsin had held that a railroad could exercise the power of eminent domain.

Railway Company v. Morehouse, 112 Wisconsin, 1.

This left a gap. Private parties could in certain cases build their own sidetracks provided they owned or could purchase the right of way therefor. Railway companies could on their own motion build spur tracks and condemn land for that purpose and could be compelled by the Railroad Commission "to furnish reasonably adequate service and facilities," but there was no statute making it obligatory on railway companies to build a spur track whenever the necessities of an industry required it, or placing in the hands of those controlling industries the power to compel the building of spur tracks. It was evidently to fill this gap that the act of 1907 was passed.

We submit that the jurisdiction of this court in this case is perfectly clear, that the issue involved is of sufficient gravity to warrant and require full argument, and that therefore the motions should all be denied.

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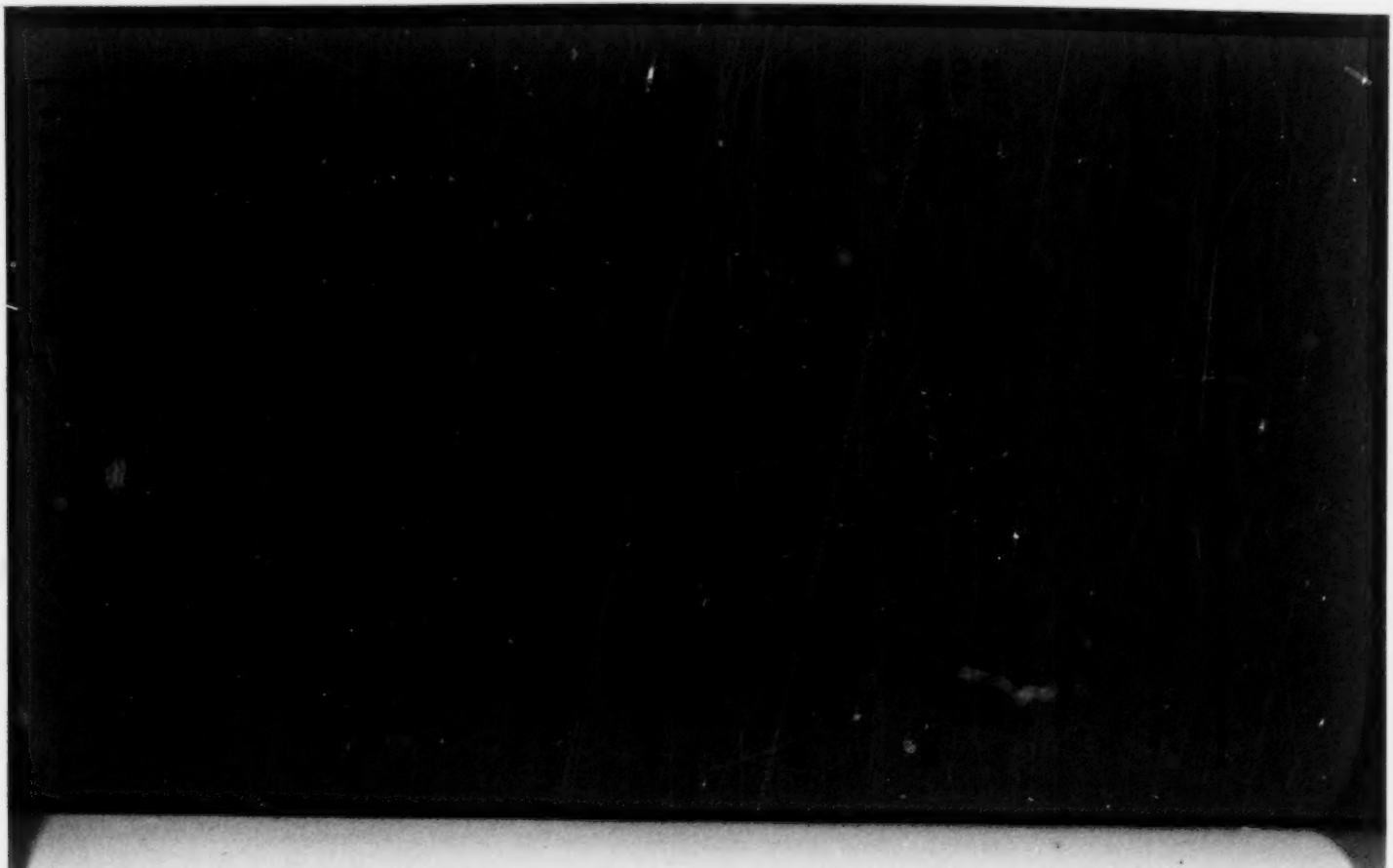


Supreme Court of the United States

OCTOBER TERM, 1913

No. 529

UNION LIME COMPANY, PLAINTIFF IN ERROR,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME AND STONE COMPANY, DEFENDANTS IN ERROR.

Motion of defendant in error, Eden Independent Lime & Stone Company to dismiss the writ of error or affirm the judgment and decision of the Supreme Court of Wisconsin and the brief of argument in support thereof.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the Eden Independent Lime & Stone Company, a defendant in error, and moves the Court to dismiss the writ of error sued out by the plaintiff in error, Union Lime Company, in the above entitled cause from the judgment of the Supreme Court of the State of Wisconsin entered on the 11th day of March, 1913, on the ground that this Court has no jurisdiction to review the judgment complained of herein:

And also moves the Court to affirm the judgment to which this writ of error is taken on the ground that it is manifest that the writ was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

In case the above motions are denied, the defendant in error also further moves the Court to order the cause transferred for hearing to the summary docket.

STATEMENT.

This action was originally brought in Circuit Court for Fond du Lac County, Wisconsin, by the Chicago & Northwestern Railway Company, defendant in error, to condemn a strip of land One Hundred and Sixty-five (165) feet in length, owned by the Union Lime Company, plaintiff in error, for the purpose of extending an exist-

ing spur track, owned and operated by said Railway Company and serving the interests of the plaintiff in error and another Lime Company in their business of burning lime and quarrying stone, to connect with and furnish facilities for transporting the lime and stone of the Eden Independent Lime & Stone Company, defendant in error, and owner of the adjoining track of land. The Union Lime Company answered in the matter and raised the question of whether the taking was for a public purpose. The Circuit Court decided that the taking was for a public purpose and the Supreme Court affirmed this decision. The sole question before this Court in this matter, then is, whether or not the finding of the highest Court of the State to the effect that a condemnation by a railroad company of land necessary to construct a spur track to reach a natural deposit of such a nature that spur track facilities are indispensable to the operation and exploitation thereof, is authorized by the laws of that State and is for a public purpose, will be set aside by this Court as in violation of the 14th amendment to the Constitution. The public use is so apparent under the facts as above stated and the decisions of this Court to that effect are so numerous that the plaintiff in error has attempted to distinguish this case from other similar ones by the manner in which the question arises and the statute under which the authority is given. Therefore, a more detailed statement of the case is necessary to show the fallacy of this attempt to distinguish it and to expose the real objects and purposes of the opposition.

In June, 1909, the Eden Independent Lime & Stone Company, made application to the Chicago & Northwestern Railway Company to extend the spur track above mentioned so as to permit the development of the natural resources upon the property of the said Eden Independent Lime & Stone Company and permit of the same being moved to the markets of the State. The Railroad Company declined to extend the spur track without the consent of the Union Lime Company and the Nast Brothers Lime & Stone Company, the other lime companies using said spur, which consent these companies, not desiring a competitor, refused to give. That thereafter in the month of August of the same year the Eden Independent Lime & Stone Company filed a petition with the Railroad Commission of Wisconsin praying an order directing the said Chicago & Northwestern Railway Company to extend said spur track. Proceedings were had before said Commission at which the Eden Independent Lime & Stone Company was heard in support of said petition and the Union Lime Company and the Nast Brothers Lime & Stone Company were heard in opposition thereto. Thereafter the Commission duly entered an order granting the prayer of the petitioner and ordering the extension of the spur track. To set aside this order the opposing Lime Companies brought an action in the Circuit Court for Dane County, Wisconsin, against the Railroad Commission of Wisconsin and upon being therein defeated, prosecuted an appeal to the Supreme Court of the State. The decision in that case, reported in Vol. 144 of the Wisconsin reports on pages 523—544, inclusive, sustained the validity of the statute under the authority of which the order of the Railroad Commission was entered but

reversed the case on another ground. Thereafter the Eden Independent Lime & Stone Company made another petition to the Railroad Commission of Wisconsin asking for the extension of said spur track and after hearing at which all parties to this present suit were represented the Railroad Commission entered another order in pursuance of which the Railroad Company brought the present action for the purpose of condemning the right-of-way necessary to permit them to comply with the said order of the Railroad Commission.

The statute under the authority of which the order of the Railroad Commission was entered is as follows:

Spur Tracks. Section 1797—11m. 1.—Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain and operate a reasonably adequate and suitable spur track, whenever such spur track does not necessarily exceed two miles in length, is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest.

Cost of Construction. 2.—Such railroad may require the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; * * * provided, however, that when any such person, firm, corporation or association, shall be required by the commission to deposit with the railroad, the total estimated cost, as herein provided, such person, firm, corporation or association, may offer or cause to be offered, a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such railroad, and conditioned upon the construction of such spur track in good and workmanlike manner, according to the plans and specifications provided by such railroad and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and security company bond shall be offered the person, firm, corporation or association primarily to be served thereby, shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further, that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation or association primarily to be served thereby, shall give the railroad a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expense incurred beyond the amount so deposited with the railroad.

Connection with Spur Tracks: Application: Cost. 3.—Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and any person, firm, corporation or association shall desire a connection with such spur track application therefor shall be made to the commission, and such person, firm, corporation or association shall be required to pay to the person, firm, corporation or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof to be determined by the commission, upon such application and notice, to the persons, firms, corporations, or associations that have paid or contributed toward the original cost and expense of acquiring the right of way and constructing the same.

1797—12n. (Ch. 352, 1907; in effect June 25, 1907.)

Appeal from Railroad to Commission. Section 1797—12n. In case of the failure or refusal of any railroad to comply with any of the provisions of sections 1797—11m, and 1797—12n, the person or persons, firm, corporation or association aggrieved thereby may file a complaint with the railroad commission setting forth the facts, and facts, and the said commission shall investigate and determine the matter in controversy in accordance with the provisions of sections 1797—1 to 1797—38, inclusive, and any order it shall make in said proceeding shall have the same force and effect as an order in any other proceeding properly begun under and by virtue of the provisions of said sections."

In the trial court no evidence was introduced findings being made and order entered upon the pleadings. The Court found the following facts:

The organization of the Chicago & Northwestern Railway Company and its authority to construct, operate and maintain the spur track thereinafter described. (Trans. P. 17.)

The ownership of the main line of railroad running through the section in which the spur track lies, used for general railroad business.

The organization of the Nast Brothers Lime & Stone Company and the Union Lime Company and the nature and location of their businesses.

"That for a number of years prior to the times herein alleged, your petitioner was, ever since has been, and now is the owner and in possession of, and engaged in operating, a spur track (together with branches, switches and sidings) with right of way therefor, which said spur track branched from and connected with your petitioner's main line in said section five (5) aforesaid, and ran on and partly through said southeast quarter of said section six (6), connecting with and serving the interests and business of the said companies aforesaid."

"That Eden Independent Lime & Stone Company is a corporation organized under the laws of the State of Wisconsin, and was, prior to the commencement of the proceedings before the Rail-

road Commission hereinafter alleged, the owner of certain premises, quarries, plants, buildings, lime kilns, etc., on the southwest quarter of said section six (6) aforesaid." (Trans. P. 18.)

The proceedings before the Railroad Commission, appearances of and participation by the parties therein and the order entered by said Commission.

Compliance by the Eden Independent Lime & Stone Company with the terms of the order. (Trans. P. 19.)

That it is necessary to take and condemn the property and premises herein described for the purposes set forth in the petition.

A description of the real estate necessary to be taken and the ownership thereof.

That it is the intention of said corporation, the petitioner, in good faith to use said real estate sought to be acquired in this proceeding, for the uses and purposes herein set forth.

That the existing spur track was constructed under agreement with the owners of the property.

Citing the statutes authorizing the Railroad Commission to enter the order. (Trans. P. 20.)

That the Eden Independent Lime & Stone company is a private corporation.

That the use for which said lands is sought to be taken and condemned is a public use, and that such taking will not deprive the Union Lime Company of its property without due process of law, or violate any provision of the Constitution of the United States or any amendment thereof.

In the decision of the Supreme Court of the State in this case little more was done than to refer to the former decision on the constitutionality of the law and therefore it is deemed necessary to here present the following excerpt from the former decision:

"Plaintiffs challenge the constitutionality of the statute on the ground that the side tracks provided for are private, and that land taken for right of way for such side tracks is taken for a private and not for a public use, contrary to the provisions of section 13, art. 1, of the Constitution of this state, and contrary to the provisions of the fourteenth amendment to the Constitution of the United States. It if be conceded that the side tracks are private, then the objections raised by plaintiffs must be deemed well taken. But the case of Chicago & Northwestern Ry. Co. V. Morehouse, 112, Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918, negatives such a concession. It was there held that the taking of land for a side track under section 1831a, St. 1898, was a taking for a public use, even though the side track ran to a single industry and the owners thereof were to bear a large part of the expense. That section authorized a railroad company in its discretion to acquire right of way by condemnation for a spur track, not exceeding five miles in length, to any industry therein mentioned, without any restrictions as to its being practically indispensable to the successful operation thereof or unusually unsafe and dangerous, or unreasonably harmful to public interest. If it was a valid exercise of legislative power to authorize a railroad company, in its judgment, to condemn a right of way for a spur track five miles in length without any re-

strictions as to public safety or interest, it must certainly be held to be so to authorize the Railroad Commission to order a spur track two miles in length to be built under the safeguards to public interests provided by section 1797—11m.

"Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it. And this is the crucial test as to whether or not the track is a private or public one. If it is open to the use of any one who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of any one else using it, or the extent of such use. Chicago & N. W. Ry. Co. v. Morehouse, 112 Wis. 1, 87, N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918; Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387. That such tracks are to be open for the use of the public generally is clearly evidenced by the statute for it speaks of the industry primarily to be served and makes provision for others securing the same service by sharing in the initial cost, thus evincing a clear intent to subject the track, upon equitable terms, to the use of any one who may require it. Its operation, too, is subject to state control under general laws, and neither the railroad nor the owner of the industry can in any respect interfere with such control. The reasons for holding the provisions of section 1831a, St. 1898, constitutional apply more strongly to the provisions of section 1797—11m, and they are so clearly set forth in the case referred to, that a more extended discussion of the subject here is not deemed necessary."

As the foregoing quotation would not be complete without reference to the case of Chicago & Northwestern Ry. Co. vs. Morehouse, 112 Wis. 1, therein cited and referred to the following is printed from the opinion in that case:

"It seems that the weight of judicial authority, and the better reasoning, are in favor of the legislation in question. A brief reference to some of the leading authorities will amply show that the fact that a spur track may run to a single industry does not miliate against the devotion of the property thereto being a public use there-

of, so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served, without discrimination. In De Camp v. Hibernia U. R. Co., 47 N. J. Law, 43, a leading case, the Court said:

'This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Everyone of the public having occasion to send materials, implements, or machinery for mining purposes into or to obtain ores from the several mining tracks adjacent to the location of this road, may use this railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public.'

"However, the Court said that where the franchise is in its nature public, like the transportation of frieght, and the industry permitted is one that concerns the public, and all who desire to be served by the enterprise can demand service on equal terms, the number who can take advantage of the convenience is not material. In Contra Costa C. M. R. Co. v. Moss, 23 Cal. 323, it was held that what constitutes a public use is a matter resting in the sound discretion of the legislature, and that its will must prevail unless it is guilty of a manifest abuse of power; that the imposition on a railroad company by law of the duty to act as a common carrier, where the primary purpose of the company in building its road is to develop an industry in which the public is interested, renders the use of the property of the railroad public and justifies the legislature in granting it the right to resort to sovereign authority so far as necessary to acquire from private parties the property necessary to its enterprise. Chicago, V. & N. R. Co. v. Porter, 43 Minn. 527, involved every question discussed in this case. The petitioner sought to acquire private property for the purpose of establishing and operating a spur track to a single lumber industry. The evidence showed that the track was to be a part of the petitioner's railway system, was to be used to transport freight to and from the industry at the terminus thereof, and that the principal if not the only freight expected was that to be furnished by the proprietors of such industry directly or indirectly; but that the road was to be open to all persons who might desire such service over it. The right of the petitioner to acquire the land for its right-of way was sustained, the Court saying:

'The character of the use, in the case of a railroad or railroad track, does not depend on the amount of business or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have a right to the use of it, it is a public use or interest, though the number who require its use may be small. There is nothing to show that the proprietors of the particular industry are to have any control over or management of the track in question, or to have any right in it other than that of any person or corporation having business establishments along or near it, to-wit, the right to ship and receive freight upon it carried or to be carried over plaintiff's lines.'

* * * * * * *

"From the foregoing it will be seen that whether a particular use of property may reasonably be declared public has been solved uniformly according to circumstances. That the agency seeking to take the property by legislative authority is essentially a quasi-public agency, as a railway corporation, has a very important bearing on the question, and likewise has the importance of the particular industry to be promoted; and the two together have generally been deemed controlling. Where the mining of coal is an important industry, it is held that the legislature may legitimately say that the taking of property for a railroad, indispensable, or reasonably necessary, to the successful operation of a particular coal mine, is a taking of property for public use. Where lumber industries are important factors in the employment and enrichment of the people, the taking of private property for a railroad for the convenience in the main, of the proprietors and patrons of an industry of that kind, is deemed a taking of private property for public use. Where the fertilization of arid lands is deemed material to the development of the country, it is held to be within legislative discretion to declare the taking of private property for irrigating canals a taking of such property for public use. In the early settlement of the country the importance to the general welfare of establishing and maintaining gristmills was such that it was held that the use of the land covered by back water from the milldams was a public use thereof within the meaning of the constitution. The instances are very few where a grant of power to a recognized public agency, such as a railroad corporation, to exercise the power of eminent domain to acquire private property for its right of way, either for its main track or for its side tracks, or spur tracks to be operated as a part of its railway system, the right to declare what shall be deemed a public use being vested primarily in the legislature, has been condemned by the courts. We cannot discover any good reason for condemning the legislative action in question in this case, and therefore must affirm the order appealed from."

ARGUMENT.

It is submitted that the decision of the state court should be affirmed on this motion for the reason that the same is so clearly right that the case ought not to be held for further argument.

Arrowsmith vs. Harmoning, 118 U. S. 194; 6 Sup. Ct. Rep. 1032;
Lowe vs. Williams, 94 U. S. 650.

In determining whether or not the decision of the state court is clearly right it is essential that the construction of the statutes by the state court be well understood, for it has been uniformly held that this Court follows the construction of the statute given by the highest court of the state.

Missouri Pac. Ry. Co. vs. Nebraska, 164 U. S. 403; 17 S. Ct. 130.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112, 17 S. Ct. Rep. 56, 41 U. S. (L. ed.) 369.

The highest court of the state of Wisconsin has held that the track constructed under the statute in question becomes a portion of the trackage of the railroad, is at the service of the public and

constitutes an integral part of the railroad system; that the duty to main and operate it rests upon the railroad company and that the track stands in the same relation to it that any other portion of its track does; that the owner of the industry obtains no interest in or control over it beyond that of being served by it equally with anyone else who may desire to use it; that its operation is subject to state control under general laws and neither the railroad nor the owner of the industry can in any respect interfere with such control.

The general public may use the track in question if they desire. They may do so as a matter of right just as they may use any other portion of the railroad's trackage and this right of the public is held by the state court to be the crucial test. "If it is open to the use of anyone who may desire, upon equal terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of anyone else using it, or the extent of such use." It is not essential that the public use the track generally, but that they have the right to do so if the occasion arises.

WELL SETTLED RULE.

The rule laid down by the Wisconsin Court for determining whether land condemned for a spur track is taken for a public use is the general rule in the State Courts.

In 15 Cyc 590, the rule is stated as follows: "A branch or lateral road, spur, or switch track necessary to the proper operation of the main line of the railroad, or which may be necessary to connect important industries, or even a single industry, with the main line or other public highways, provided, however, that the general public has a right to use it, although it may also subserve private interests, is a public use for which private property may be taken under the power of eminent domain."

In a note to Kansas City, etc., R. Co. v. Louisiana Western R. Co., 7 Am. & Eng. Annotated cases 835, the rule is stated as follows: "In accordance with the general rule that land can be appropriated by eminent domain proceedings only for a public, as distinguished from a private use, the right of a railroad company to condemn land for the construction of a spur track to a private establishment depends upon whether the spur is to be constructed for public or for private purposes. If the spur track is to be built solely and exclusively for the benefit and accommodation of the railroad company and of the owner of the private business enterprise, it may well be said that it would serve no public purpose and would be of no public use although the existence of such a track might be of great but indirect benefit to the community by enabling the private enterprise to be carried on, thereby giving employment to labor. But it is held in a majority of the jurisdictions that the mere fact that the primary purpose of such a spur is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right of public to its use, and not by the extent to which that right is or may be exercised. If the spur track may be used by the public generally upon

equal terms, not merely by permission but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one, and it is not material that but few persons enjoy it or that it also serves a private use."

In 2 Elliot on Railroads (2d Ed.) it is said on page 515: "And the weight of authority, as well as the better reason, seems to be to the effect that lines of railroad, branches or spurs to mines, manufacturing establishments, and the like are a public use for which land may be condemned, where the general public have the right to use them or to be served without discrimination."

The state courts holding to this rule embrace those of Arkansas, California, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia and Wisconsin, as shown by the following cases:

St. Louis etc., R. Co. vs. Petty, 57 Ark. 359, 21 S. W. Rep. 884.

Roberts vs. Williams, 15 Ark. 43.

Madera Ry. Co. vs. Raymond Granite Co. 3 Cal. App. 668, 87 Pac. 27, citing and approving Ulmer vs. Lime Rock R. Co. 98 Me. 581.

People vs. Blocki, 203 Ill. 363, 67 N. E. 809.

South etc. R. Co. vs. Dix, 109 Ill. 237.

Bedford Quarries Co. vs. Chicago etc. R. Co. (Indiana) 94 N. E. Rep. 326 and other cases there cited. Well considered case.

Dubuque, etc. R. Co. vs. Ft. Dodge etc. R. Co. 146 Iowa 666, 125 N. W. 672.

Dotson vs. Atchison etc. R. Co. 81 Kan. 816, 106 Pac. 1045.

Hurd vs. Atchison etc. R. Co. 73 Kan. 83, 84 Pac. 553.

Chesapeake Stone Co. vs. Moreland (Ky.) 164 S. W. 762.

Riley vs. Louisville etc. R. Co. 142 Ky. 67, 133 S. W. 971.

Kansas etc. R. Co. vs. La. Western R. Co. 116 La. 178, 40 So. Rep. 627, citing with approval C. & N. W. Ry. Co. vs. Morehouse, 112 Wis. 1.

Ulmer vs. Lime Rock R. Co. 98 Me. 579, 57 Atl. Rep. 1001.

New Central Coal Co. vs. George's Creek Coal etc. Co., 37 Md. 537.

State vs. Chicago etc. R. Co. 115 Minn. 51, 131 N. W. 859.

Kettle River R. Co. vs. Eastern R. Co. 41 Minn. 461, 43 N. W. 469.

Chicago etc. R. Co. vs. Porter 43 Minn. 527, 46 N. W. 75.

Kansas etc. Coal R. Co. vs. Northwestern Coal etc. Co. 161 Mo. 288, 61 S. W. 684.

Kipp vs. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237.

Butte etc. R. Co. vs. Montana Union R. Co. 16 Mont. 504, 41 Pac. 232.

National Docks R. Co. vs. Central R. Co. 32 N. J. Eq. 755.

Watson vs. New York Central R. Co. 47 N. Y. 157.

State vs. Toledo etc. R. Co. 24 Ohio Cir. Ct. 321.

Wolfard et al vs. Fisher, 48 Oregon 479, 87 Pac. 530.

Rochester etc. Coal etc. Co. vs. Berwind-White Coal Mine Co., 24 Pa. Co. Ct. 104.

Rudolph vs. Pennsylvania Schuykill Valley R. Co., 166 Pa. St. 430, 31 Atl. 131.

Getz vs. Philadelphia etc. R. Co. 105 Pa. St. 547.

Alfred Phosphate Co. vs. Duck River Phosphate Co. (Tenn.) 113

S. W. 410, citing Ryan vs. Louisville & N. Terminal Co. 50 S. W. 744.
Stockdale vs. Rio Grande etc. R. Co. 28 Utah 201, 77 Pac. 849.
Zircle vs. Southern R. Co., 102 Va. 17, 45 S. E. Rep. 802.
State vs. Superior Court, 42 Wash., 675, 85 Pac. 669.
Caretta etc., R. Co. vs. Virginia etc., Coal Co., 62 W. Va. 185, 57 S. E. 401.
Chicago etc., R. Co. vs. Morehouse, 112 Wis. 1, 87 N. W. 852.

DECISIONS OF THIS COURT.

The decisions of this Court touching upon this identical question of the condemnation of property for spur track purposes are not numerous, but so far as the question has been considered, it is submitted that the decisions of this Court also sustain the general rule hereinabove stated and followed by the Wisconsin Court in this case. The case of the Missouri Pac. Ry. Co. v. Nebraska, 217 U. S. 196, relied upon by the Counsel for plaintiff in error in the argument before the Supreme Court of the State as authority of this Court in opposition to the rule of the state court and the general rule herein stated, is entirely in accord with the above rule. That decision did not hold that the statute of Nebraska requiring railroad companies to construct side tracks to grain elevators along the right-of-way invalid because it provided for the taking of property for a private rather than a public purpose, but on the ground that it required these tracks to be constructed by the railroad companies at their own expense and therefore deprived the railroad company of its property without due process of law because no compensation was provided. Another important feature of the statute in that case was that no hearing was provided at which to determine whether or not compliance with the statute was required in the particular instance. The Wisconsin statute differs from the Nebraska statute on both of these points. It requires a proceeding before the Railroad Commission of the State to enforce compliance with the statute in the proper case, and it also provides that the applicant for the spur track service shall deposit with the railroad company the estimated cost of obtaining right-of-way and constructing the track, as determined by said Railroad Commission. And from a reading of the opinion of the court in the above mentioned case, one is justified in the assumption that had these provisions existed in the Nebraska statute, that the decision of this court in the case above mentioned would have sustained the validity of the law.

Furthermore, the statute provides for an appeal from the order of the Railroad Commission on the ground that the order is unreasonable, thus insuring that only in such cases as the building of the spur is reasonable will its construction be required. Union Lime Co. v. Railroad Commission, 144 Wis. 523.

In the case of Hairston v. Danville & Western Ry. Co., 208 U. S. 598, this Court held that the uses for which the track in that case was desired were not the less public because the motive which dictated its location over the particular land was to reach a private

industry, or because the proprietors of that industry contributed in any way to the cost.

In that case it also appeared that the owners of the private industry who would be served by the track, had no interest in or control over the same and that the public had the right to use the track if they desired, although it appeared that the elevation of the track was such that only by changing the grade of certain streets could it be made available for ordinary shippers. In that case this court stated what its attitude is as regards questions of this character which pertain primarily to the interests of the states themselves and it is deemed worthy of inserting at this place.

"The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in Fallbrook Irrigation Dist. v. Bradley, ub. sup., Clark v. Nash, ub. sup., and Strickley v. Highland Boy Gold Min. Co., ub sup. What was said in these cases need not be repeated here. No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. In Missouri Pac. R. Co. v. Nebraska, ub. sup., it was pointed out (page 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state constitution, law and court approve will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States."

It is submmitted that the statute in question in this case deals with a situation which is peculiarly within the province of the state to regulate and control because of the fact that the state knows and appreciates the needs of the interests of the state. It is a law enacted in accordance with the rules laid down and followed by numerous state courts for a long number of years; it is a statute which complies with the state constitution which has been held to prohibit the taking of private property for other than a public use and without just compensation; it is a statute which provides a reasonable and proper method of enforcement which protects the interests of all parties concerned, and it provides for just compensation for all expense incurred by everyone except the party who voluntarily pays the same.

SPECIAL CIRCUMSTANCES.

Under the authorities above cited any track constructed under the provisions of this statute would be a public track and land taken for the purpose of constructing a track thereon would be taken for a public use but in view of the fact that the taking in this particular instance has been specifically held by the state courts to be for a public use and for the further reason that the plaintiff in error is interested only as regards the facts and circumstances of this case, and is in a position to complain only of this particular taking, it is deemed advisable to call attention to certain facts wherein the present case might differ from some other instance under the statutes, as bearing upon the good faith in which the writ of error was taken and the seriousness of the questions involved.

In the first place the Chicago & Northwestern Railway Company, already has a spur track about 2400 feet in length, which crosses the property of the Nast Bros. Lime and Stone Company, a public highway and the property of the Union Lime & Stone Company, and extends to within 165 feet of the property line of the Eden Independent Lime & Stone Company. This existing spur is owned and operated by said Railway company and is subject to state control and regulations under general laws. It owns the right of way upon which the track is constructed. The Union Lime Company has no interest in or control over the spur other than to receive reasonable service the same as other members of the public are entitled to receive under the duties of the said Railroad Company as a common carrier. The purpose of the present proceeding is to condemn this strip of 165 feet in length and 80 feet in width. The track or tracks to be constructed upon this strip of land will not connect directly with the main track of the said Railway Company, but will be connected with and become a part of the spurs or the spur already in existence. Therefore, the entire spur, the part existing, and the part proposed to be constructed should be considered as a unit in order to accurately and fairly judge the matter. The uses, both as to nature and extent, of the spur as a unit should be considered in determining whether such use is public. The spur should be considered as though it were all being constructed at the same time and as though the uses contemplated are all the uses now made or which might be made of the part already constructed and the uses which are proposed to be made and which might be made of the part to be built.

As was said by the Court in Ulmer v. Lime Rock Co., supra, when a spur track is first constructed it is usual that only one or two persons or industries have occasion to use it but gradually the use is extended to more and more shippers until it is in general use and if the track is originally constructed under such conditions that this future demand can be satisfied as a matter of right, the original use although limited, is public and not private. In the present case, because the opposing Lime Companies were the only ones to use the existing spur when it was first constructed, they thought they had some special interest in and control over it but they abandoned this idea before the present proceeding was instituted and did not set it up in their answer. They merely allege that the track was constructed

under agreement. This can make no difference for a public highway laid out by agreement with the owners of the abutting land is just as public as though the land for the same was condemned. The railroad owns the right of way; it owns the track and facilities and operates them in connection with its other property.

The present proceeding is an attempt to make more public the use of the existing spur, and it is entirely possible and very probable in fact, although carefully kept out of the record in this case by the railroad company and the Union Lime Company who were the only parties to the proceeding when the record was made up in the Circuit Court, that the future will show other demands for service upon this spur track. The employes of the present companies and the one seeking service at this time constitute quite a community and the court can take judicial notice of the fact that there is a Post Office at this place, Marblehead, Wisconsin.

Furthermore, the nature of the business to be served in this case is such that it justifies the application of the rule of those cases where the taking has been held to be for a public purpose even though there is no intention or expectation that the public generally shall use the property taken and in which in fact the use by the public generally is not provided for. Such for instance was the case of Clark vs. Nash, 198 U. S. 361, where a statute giving one property owner the right to condemn a right of way across the land of another for an irrigation ditch was held to be a taking for a public purpose even though the ditch was for the use of the particular property owner and the public generally had no rights in the same. To the same effect was the case of Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112, and the case of Strickley vs. Highland Boy Gold Mining Company, 200 U. S. 527, where the statute provided for the condemning of a right of way for an aerial cable for the purpose of transferring the ore of a mining company in buckets to the railroad below the mine on a mountain side. In that case there was no intention to transfer the ore of any but the particular mining company and the general public had no right to use the right of way acquired. These and similar cases have been upheld as not violative of the 14th amendment to the Constitution on the broad general grounds stated in the opinions of this court that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In the present case the track will reach a natural mineral deposit of such a nature that railroad facilities are indispensable to its development. Building stone, crushed stone and lime are commodities which are dealt in car load lots and which on account of their weight and bulk are difficult and expensive to handle. In the present age and method of building, road, street and sidewalk construction nothing is of more importance to the public generally than to have an adequate and unrestricted supply of those materials readily accessible. As has been said in other cases these natural resources should not remain locked forever in the bosom of the earth because one owner refuses to permit a proper outlet for the same to be constructed across his property.

It is submitted that in view of the decisions of the state courts and of this court above cited the contentions of the plaintiff in error cannot be urged very seriously, and it is proper upon this motion to look elsewhere for the motives of the plaintiff in error in taking this action.

If the railroad company were the complaining party in this proceeding a very plausible reason for its action could be given. The railroad company might be interested in establishing the law in the matter for guidance in future cases of which it will no doubt encounter quite a number and in fact several applications have already been made to the Railroad Commission. The Plaintiff in error however stands in no such position. It will probably not be interested in another case. Its interest extends only to the vindication of its right in the present instance. It complains only of the taking of this strip of land 80 feet wide by 165 feet long, the value of which certainly does not exceed the sum of $200.00, the amount estimated by the Railroad Commission as the cost and expense of the condemnation proceeding including the compensation for the property taken. The value of the property to be taken is hardly such as would induce the plaintiff in error to litigate the matter for more than four years and to the highest court of the United States. Neither is there any sentimental value attached to the property to be taken. It is not a part of any homestead or residence property but is a part of property used for industrial purposes through which the locomotives at present run. The real purpose of the taking of the writ is disclosed in the fact that the business which the entension of the spur will serve is the same as that engaged in by the plaintiff in error. And it is worthy of notice in connection with this that in the former case before the state supreme court the Nast Brothers Lime & Stone Company as well as the Union Lime Company were parties plaintiff, the action being against the Railroad Commission. The Eden Independent Lime & Stone Co., defendant in error has had to stand the brunt of the expense of the litigation in upholding this law and by postponing the final decision the opposing lime companies may be as successful as though the decision were in their favor.

The railroad company has not actively opposed the enforcement of the law in any of the proceedings but it has not been particularly interested in upholding the statute. The railroad company under section 1831a R. S. Wisconsin has the power upon its own initiative to condemn land for spur tracks to industries and was not anxious to sustain a law giving the railroad commission authority to order the company to proceed in a proper case. It preferred to have authority to exercise the power when it wanted to, rather than when ordered. It was on a showing of this lack of interest apparently shown by the railroad company that the Supreme Court of the state, upon a verified petition, allowed the Eden Independent Lime & Stone Company to intervene after the case had been removed by appeal from the Circuit to the Supreme Court. The railroad company has shown the same lack of interest in having the matter speedily disposed of by refusing to join in this motion to dismiss the writ of error and affirm the judgment of the state court. And it was to insure that the matter would be fairly presented to this court and a determination speedily arrived at that the Supreme Court of the State made this defendant in error

a party to the proceeding. Such action is justified under the following decision of this court:

Chicago & G. T. R. Co. vs. Wellman, 143 U. S. 339.

Defendant in error has been put to considerable expense in defending this writ of error and has suffered a great deal of damage by reason of being unable to prosecute its business. Plaintiff in error executed a bond in the sum of Ten Thousand dollars to secure defendants in error against costs and damages on this writ of error and in the event that the writ is dismissed or the judgment of the state court affirmed this defendant in error requests and prays that the court make such order respecting damages and costs as is just and proper.

The docket of this court is crowded with cases involving more property and more important and difficult questions than are presented in this case, and if this matter is heard in its regular order the decision will be delayed so long that even if defeated the purpose of the plaintiff in error will have been accomplished. The question involved is clear and definite. Its decision is governed by a well settled rule of this court and the state courts. This defendant in error prays that the matter be determined upon this motion at the earliest convenience of this Honorable Court.

Respectfully submitted,

L. E. LURVEY,

Attorney for Defendant in Error,

Eden Independent Lime & Stone Co.

In the Supreme Court of the United States

OCTOBER TERM 1913

No. 529

UNION LIME COMPANY,
Plaintiff in error,

versus

CHICAGO & NORTHWESTERN RY. CO.,
and EDEN INDEPENDENT LIME & STONE CO.,
Defendants in Error.

The Union Lime Co. and the Chicago & Northwestern Railway Co., above named as parties to the above entitled action are hereby notified that the undersigned will, on Monday the —— day of January A. D. 1914, at the opening of court on that day, or as soon thereafter as counsel can be heard submit the foregoing motions and brief to the Supreme Court of the United States, in its Court Room, at the Capitol, in the City of Washington, District of Columbia; a copy of which motions and brief thereon are hereby delivered to you.

L. E. LURVEY,
Attorney for Eden Independent Lime & Stone Company,
Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the motions and brief thereon mentioned therein are hereby acknowledged this —— day of December A. D. 1913.

.....
Attorneys for Union Lime Co.

.....
Attorney for Chicago & Northwestern Ry. Co.

Supreme Court of the United States

Office Supreme Court, U.
FILED
FEB 24 1914
JAMES D. MAHER
CLER

OCTOBER TERM, 1913.

No. 529.

UNION LIME COMPANY,

Plaintiff in Error,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR DEFENDANT IN ERROR, CHICAGO & NORTH WESTERN RAILWAY COMPANY.

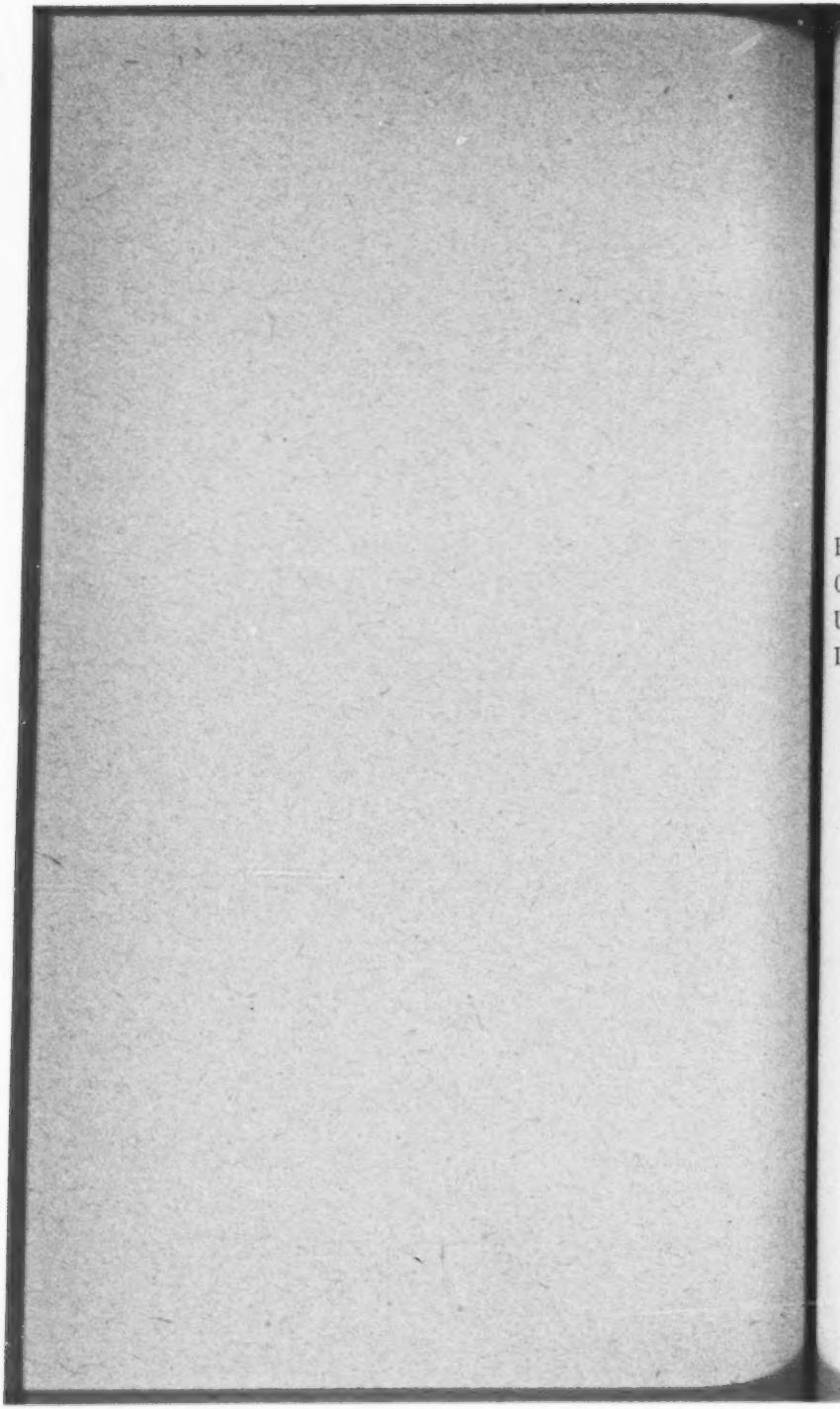
EDWARD M. SMART,

Attorney for Chicago & North Western Railway Company.

EDWARD M. HYZER,

Of Counsel.

GANNON PRINTING CO., MILWAUKEE.



INDEX OF CASES CITED.

	PAGE
Hairston vs. Railway Company, 208 U. S., p. 598	1
C. & N. W. Ry. Co. vs. Morehouse, 112 Wis., p. 1	2
Union Lime Co. vs. R. R. Commission, 144 Wis., p. 523	2
Ill. Cent. Ry. Co. vs. East Sioux Falls Quarry Company, 144 N. W., 727	3

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 529.

UNION LIME COMPANY,

Plaintiff in Error,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR DEFENDANT IN ERROR, CHICAGO & NORTH WESTERN RAILWAY COMPANY.

The question raised by Plaintiff in Error may, for convenience in argument, be subdivided and re-stated as follows:

1st: Assuming that the judgment of condemnation in this case was in a proceeding initiated by the railroad and based upon a sustainable finding of *necessity*, then, under the statutes and facts in the case, is it clearly shown that the taking is not for a "public use?"

2nd: Is it material that the statute authorizes the Railroad Commission, after hearing and investigation, upon a finding that the spur track is practically indispensable to a particular establishment, to order the railroad company to condemn?

I.

In Hairston against Railway Company, 208 United States, 598, this Court notes that no case is recalled where it has condemned as

a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. It points out that it has found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or of the right to flow the land of another by the erection of a dam. The Court says:

"It remains for the *future* to disclose what cases if any of taking for uses which the State Constitution, law, and Court, approve, will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States."

A study of the decisions of this Court does not disclose that the Court has yet found the case unfound at the time of that decision, but counsel for Plaintiff in Error claims this is the case. We take it that the attitude of this Court in all former cases, under the situation above stated, discloses that every presumption, inference, and intendment, will be in favor of the local statute and the finding of the state court sustaining the same.

In Chicago & Northwestern Railway Company against Morehouse, 112 Wisconsin, 1, on page 6, the Wisconsin Court says:

". . . . The law contemplates only branch tracks leading off from main railway tracks, *such branch tracks to be constructed and operated as a part of an entire railway system for the transportation of freight to and from particular points reached thereby.*"

This is re-affirmed in Union Lime Company against Railroad Commission, 144 Wisconsin, 523.

Counsel for Plaintiff in Error concedes that on questions *of construction* of the state statute this Court will follow the decision of the State court. Therefore, it is established that a spur track under the Wisconsin statute, when once built, is as much an integral part of its system as any part of the main line.

In Union Lime Company case, supra, the Court says:

"That such tracks are to be open to the use of the public generally is clearly evidenced by the statute, for it speaks of the industry *primarily* to be served and makes provision for others securing the same service by sharing in the initial cost, thus evincing a clear intent to subject the track, upon equitable terms, to the use of any

one who may require it. *Its operation too is subject to state control under general laws and neither the railroad nor the owner of the industry can in any respect interfere with such control.*"

In South Dakota they have a Railroad Commission Act built on the lines of the Wisconsin Act, and conferring practically the same power of control and supervision as is granted in the Wisconsin Act. In a similar case to the one at bar the Court, in Illinois Central Railway Company against East Sioux Falls Quarry Company, 144 Northwestern, 727 (January 23, 1914), says:

"Such spur and the service thereon will be subject to the supervision and control of the Railroad Commissioners of this state; no person can be denied an equal right with Lowe to the use of such property."

We thus have the situation where the State, through the Railroad Commission, has the same ample power and control over a spur track as over a main line. If these statutes are valid, it can compel extensions of the spur to other connections. It can compel regulations of the railroad permitting delivery of carload shipments of outside consignors at the terminus of the spur. It can fix, control, and determine any additional freight rate for delivery on the spur, either in or out. This suggestion is particularly pertinent at this time, when the newspapers publish accounts to the effect that in proceedings before the Interstate Commerce Commission it is indicated that the railroads will probably be *compelled* to make additional freight charges for deliveries on spur tracks, thereby increasing the income of the railroads of the entire country about Forty Million Dollars. Viewed in this light, a spur track has all of the characteristics, and is subject to all the control and regulation of the State, of a main line, and is differentiated only in the *extent of its use.*

Therefore, on this branch of the question, Plaintiff in Error, if it succeed, must so succeed because the *use of a spur track is limited.*

Counsel in his brief, and some of the authorities, speak of the use of a spur track as if it were solely for the use of the one or more industries thereby connected with the main track. This is too narrow a view. If this spur track is constructed it must make deliveries of quarry products at the terminus thereof. Likewise, if shippers in the outside world ship to the Eden Independent Company consignments of tools, supplies, or other material used by it in its business,

the railroad company must make delivery at the terminus of the spur track. If it refuses so to do it can be coerced by the Railroad Commission. If no rate is applicable it can be compelled to fix a rate. This all follows from the fact that it is an integral part of its railroad system.

Now, let us assume that a thousand purchasers of quarry products contract with the Eden Company for delivery thereof F. O. B. cars at quarry, so that title passes to the consignee at the quarry, who then is using this spur on the outward shipment? Again, assume that a thousand dealers in supplies make shipments under contract with the Eden Company for delivery F. O. B. quarry, who then are the users of this spur track? These questions answer themselves. The purchasers and the shippers are the users as much as if by hand or horse power they propelled the shipments in or out on the track.

Ever since the early foundations of our government the courts have sustained condemnation for the purpose of opening up "pent" roads to reach the isolated frontiersman. As Lewis in his work on Eminent Domain, 3rd Edition, Section 260, says:

"Where the road, though laid out on the application and paid for and kept in repair by a particular individual who is especially accommodated thereby, is in fact a public road and *for the use of all who may desire to use it*, then it is regarded as accomplishing a public purpose for which land may be condemned."

These decisions are not based upon the fact that the use of others is limited to those who may settle on the road and become neighbors of the isolated frontiersman. The use of others includes the doctor who comes from the main traveled road to attend upon sickness, the neighbor who has business, the solicitor who seeks business, the politician who seeks votes, and the government mail carrier who delivers mail.

Viewed in this light, it is entirely wrong to say that a spur track with but a single industry at its terminus is used and usable solely by such industry, or others who may establish themselves there. The use is by the world at large who has business with it or them. This character of use is discussed in the authorities, in the decisions of the Supreme Courts of the various states who have sustained similar statutes to here involved, it is in part the foundation of the argument of the Supreme Court of Wisconsin in the Union case above referred

to, and is particularly well stated in the case of Illinois Central Railway Company against East Sioux Falls Quarry Company, supra.

In the cases referred to in the Hairston case, supra, wherein this Court states that it has sustained statutes authorizing condemnation for irrigation ditches and aerial bucket lines, the State courts have been inclined to sustain the taking on the proposition that it was essential to the material development of the resources of the particular state. We claim that this line of reasoning is a sufficient foundation for a taking of spur tracks. As said in Union Lime Company against Railroad Commission, 144 Wisconsin, 523:

"Over it the product of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products, resulting from the building and operation thereof. That these products are supplied by a single owner or by a limited number of owners affects the *extent* but not the *nature* of its use—the track is none the less a part of the avenue through which the commodities reach the public."

The Court might well have gone farther. In pioneer times, when cost of labor was cheap and competition slight, the owner of the *quarry* or the *mine* might be able to get his product by team to the railroad station, and thus to the market, but today without the aid of the spur track this is impossible. No mine, no quarry, no ice dealer, nor the dealer in any other low grade freight shipment can market his product without direct railroad service. The labor cost would prohibit him from meeting competition. The favorable locations of competitors would drive him from the market.

Another view may be taken: In pioneer times, when the railroad reached the little hamlet, every shipper had ample room and opportunity to deliver his product at the station yard and on the cars. Today life is centering in the large cities. Factories, foundaries, and other establishments have become so numerous that it would be utterly impossible today for railroad companies to furnish terminal facilities for loading and unloading in one single congested yard. A mere glance at a city like Chicago discloses the situation. One central point of delivery would be impossible. Requirements of trade have, under the force of mere necessity, developed thousands of spur and industrial tracks. In another way this is for the benefit of the public. If every shipper from factory, foundry, or warehouse, was

obliged to deliver his product by team to one central station or railroad warehouse, the streets of the cities would be unnecessarily encumbered, lives endangered, traffic impeded, and great economic loss ensue.

Therefore, we say that the spur track, as an institution, as one of the means and methods of taking care of the present day commercial development, and of providing for the enormous and rapidly developing future trade and commerce, make it imperative that railroad service, and the railroads, as public servants, be permitted to reach and have the power and even be *compelled,* to reach the establishments of the individual industries.

We turn now to the proposition made by Plaintiff in Error that the use of the spur track involved in this case is necessarily private because: It extends from the terminus of another spur track solely on the land of the Plaintiff in error, and terminates on the private property of the Eden Independent Company; no highway gives the public access to the spur; therefore it is argued that by reason of this situation no other industries can locate thereon, nor can the public have team track delivery.

These conditions are not insuperable objections. In the first place, the Eden Company is at liberty to sell its land, so others may locate, even if the Union Lime Company refuses. In the second place, the state, through its municipalities, or by direct exercise of its power of legislation, can open up highways either through the Union Company or the Eden Company's lands. If these were objections, then every spur track law, unless all spur tracks ran on or parallel to a public highway, would founder on this rock.

We submit that when these considerations are carefully viewed and the Court gives due consideration to the State policy of the State of Wisconsin, as enunciated, in the Morehouse and Union Lime Company cases, supra, this Court will yield to the legislative and judicial policy of the State of Wisconsin as written on the statute books and declared by its courts.

II.

The able brief of the representatives of the Attorney General's office of the State of Wisconsin, who appear here as Amici Curiae, clearly demonstrates that Section 1797-11m does not confer the power

of Eminent Domain, and that the source of such power is Section 1831-a, and we can add nothing to their argument.

This brings us to the question: What is the effect of the provision of Section 1797-11m which requires the railroad company to construct a spur track "whenever such spur track . . . . . , is practically indispensable to the successful operation of any existing or proposed mill . . . ." Counsel for the Plaintiff in Error contends that this has some bearing upon and in some way qualifies or determines the *character of the use*. It does not so appear to us.

Section 1831-a confers power upon the railroad to proceed, upon its own initiative, to acquire land for spur tracks by condemnation. There is no compulsion on the part of the railroad. When it determines to exercise this power it determines *its own necessity*, and, in proceedings initiated by it, procures a determination of the *public necessity*. Evidently the legislature considered that this power of determining when it should and when it should not build spur tracks should not be left solely to the railroad. Being made the sole repository of the right of initiation, it was given the power to discriminate —to serve one and withhold service from another. No means or method was furnished for compelling service which ought to be furnished to others on equal terms. Therefore the legislature determined that it would provide machinery to *stimulate* the railroad into action. It would provide machinery for determination of *necessity* of other or further spur tracks, and such was its purpose in enacting this statute.

In our minds, Plaintiff in Error, in discussing this feature of the case, confuses *necessity* of a taking with "public use." It is unnecessary to cite authorities to the point that while the question of "public use" is a *judicial* one, the question of "necessity" is a *legislative* one. When it is once judicially determined, as we have sought to demonstrate is properly determined in this case, that a spur track of this character is for a "public use," the legislature has the sole power of determining whether a situation has arisen when it becomes *necessary* to take for "public use."

By the statute here in question, the legislature, through its delegatee of power, has provided a means for enquiring as to whether the building of a spur track is necessary and the exercise of the power of eminent domain should be made therefor. The Act fixes as the

minimum test "practically indispensable to the successful operation of any existing and proposed mill," and so forth. This test relates in no wise to the *character of the u* It relates to the legislative question—the *necessity* of the taking. Reviewed in this light, these features of the statute do not present a judicial question.

We submit that the decision of the Supreme Court of Wisconsin should be affirmed. We have not attempted to review the many authorities throwing additional light on the question, all of which are cited in the able briefs of the attorneys for the State of Wisconsin and for the Eden Independent Lime & Stone Company. We have desired solely to present additional considerations and to view the question somewhat more in detail from a practical railroad and operating standpoint.

Respectfully submitted,

EDWARD M. SMART,

Attorney for C. & N. W. Ry. Co.

EDWARD M. HYZER,

Of Counsel.

Service of the foregoing brief is hereby accepted, and delivery of a copy thereof is hereby acknowledged, this 20 day of February, A. D., 1914.

Lum Spooner Elbridge Charles

Attorneys for Union Lime Company.

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Attorney for Eden Independent Lime & Stone Company.

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Attorney General and Deputy Attorney General of the State of Wisconsin.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 529

UNION LIME COMPANY, PLAINTIFF IN ERROR,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME AND STONE COMPANY, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Wisconsin.

ARGUMENT.

The argument of the plaintiff in error centers itself upon two sections of the statutes of the State of Wisconsin, namely, Section 1797-11m, and 1797-12n. These statutes are only a part of a complete system, and therefore in order that they made be seen in their proper perspective, a reference to other sections of the statutes is necessary.

In 1905 the state of Wisconsin adopted sections 1797-1 to 1797-38, inclusive, creating a railroad commission with broad powers of control over rates, regulations and service of railroads, and to compel performance of all other public duties. Since their original enactment, there have been amendments and additions to these sections within the purview of the original act.

The law contains, among others, the following provisions:

Section 1797-2. The term "railroad" as used herein shall mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court whatsoever) that now, or may hereafter, own, operate, manage or control any railroad or part of a railroad as a *common carrier* in this state, or cars, or other equipment used thereon, or bridges, terminals or side tracks, used in connection therewith, whether owned by such railroad or otherwise, and also all street and interurban railway companies.

Section 1797-3. Every railroad is hereby required to furnish reasonably adequate service and facilities, and the charges made for any service rendered or to be rendered in transportation of passengers or property or for any service in connection therewith, or

for the receiving, switching, delivering, storing or handling of such property, shall be reasonable, and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Section 1797-9. It shall be the duty of every railroad to provide and maintain adequate depots and depot buildings at its regular stations for the accommodation of passengers, and said depot buildings shall be kept clean, well lighted and warmed, for the comfort and accommodation of the traveling public. All railroads shall keep and maintain adequate and suitable freight depots, buildings, switches and side tracks for the receiving, handling and delivering of freight transported or to be transported by such railroads; provided, that this shall not be construed as repealing any existing law on the subject.

Section 1797-11. All railroads shall afford all reasonable and proper facilities for the interchange of traffic between their respective lines for forwarding and delivering passengers and property, and shall transfer, switch for a reasonable compensation, and deliver without unreasonable delay or discrimination any freight or cars, loaded or empty, destined to any point on its tracks or any connecting lines; provided, that precedence over other freight shall be given to live stock and perishable freight.

(a) The commission shall have control over private tracks in so far as the same are used by common carriers, in connection with any railroad for the transportation of freight, in all respects the same as though such tracks were a part of the track of said railroad.

Section 1797-11m. 1. Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain, and operate a reasonably adequate and suitable spur track, whenever such spur track does not necessarily exceed three miles in length, is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest.

2. Such railroad may require the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; provided, however, that when any such person, firm, corporation or association, shall be required by the commission to deposit with the railroad, the total estimated cost, as herein provided, such person, firm, corporation or association, may offer or cause to be offered, a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such railroad, and conditioned upon the construction of such spur track in a good and workmanlike manner, according to the plans and specifications provided by such

railroad, and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and security company bond shall be offered the person, firm, corporation, or association primarily to serve thereby, shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation, or association primarily to be served thereby, shall give the railroad a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expenses incurred beyond the amount so deposited with the railroad.

3. Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation, or association shall be required to pay to the person, firm, corporation, or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof, to determine by the commission, upon such application and notice, to the persons, firms, corporations, or associations, that have paid or contributed toward the original cost and expense of acquiring the right of way and constructing the same.

Section 1797-12n. In case of the failure or refusal of any railroad to comply with any of the provisions of sections 1797-11m and 1797-12n, the person or persons, firm, corporation or association aggrieved thereby may file a complaint with the railroad commission setting forth the facts, and the said commission shall investigate and determine the matter in controversy, in accordance with the provisions of sections 1797-1 to 1797-38, inclusive, and any order it shall make in said proceeding shall have the same force and effect as an order in any other proceeding properly begun under and by virtue of the provisions of said sections.

Section 1797-15. All rates, fares, charges, classifications and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and service prescribed by the commission shall be in force and shall be prima facie reasonable, until finally found otherwise in an action brought for that purpose pursuant to the provisions of section 1797-16.

Section 1797-16. Any railroad or other party in interest being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service, may commence an action in the circuit court against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares,

charges, classifications, joint rate or rates, fixed in such order, is unlawful, or that any such regulation, practice or service, fixed in such order, is unreasonable, in which action the complaint shall be served with the summons. The commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said action shall be at issue and stand for trial upon ten days' notice by either party. All actions brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the circuit court shall always be deemed open for the trial thereof and the same shall be tried and determined as other civil actions.

From an examination of the statutes above quoted it is evident that as stated in the brief of the plaintiff in error the purpose of the Railroad Commission Law as it is called is to compel the railroads to perform all their public duties. In enacting sections 1797-11m and 1797-12n and making them a part of the Railroad Commission Law, the legislature indicated that the duty imposed by those sections is a public duty, or at least is so considered by it. That the legislature of the state either directly or through an administrative officer, board or commission as in this case has authority under its police power to regulate railroads has been settled through a long line of decisions in this court as the following cases clearly show.

"The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Atlantic Coast Line R. Co. vs. North Car. Corp. Com., 206 U. S. 1, 27 Supr. Ct. Rep. 585.

"Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions."

Wisconsin M. & P. R. Co. vs. Jacobson, 179 U. S. 287, 21 Supr. Ct. Rep. 115.

The only question now considered by the court in relation to this matter is the nature and extent of the control and regulation which may be exercised.

Wisconsin M. & P. Co. vs. Jacobson.

The decisions of this court show a great latitude as to what constitute reasonable and valid regulations, and the decisions of the state courts probably show a still wider range.

Nearly every state in the Union has some regulation regarding spur tracks to mines, quarries, warehouses, elevators and industrial

plants. In a great many instances the provision is similar to that contained in section 1802 statutes of Wisconsin quoted in the brief of the plaintiff in error, requiring railroads to connect with and serve private industries over spur tracks built by the private industry up to the right of way of the railroad, the expense of the service and maintenance of the spur to be paid for by the industry served. Other regulations have provided for the initial cost of the track to be borne by the railroad and required the private industry to provide the right of way. Still other regulations have required the expense to be justly apportioned between the railroad and the industry served. In some instances the duty is imposed by the law directly, while in others the power is vested in the board or commission having general supervision of railroads.

The Constitution of the state of Oklahoma contains a provision requiring railroads to connect with their tracks, spur tracks constructed by private parties.

In Illinois the statute provides that railroads shall permit connections to be made with their tracks by spur tracks running to and from public warehouses, coal banks or coal yards.

Chicago & A. R. Co. vs. Suffern et al. 129 Illinois 274, 21 N. E. 824.

In the case of People vs. C. & N. W. Ry. Co. 47 Ill. 436, the Illinois court held that by the rules of the common law, railroad companies can be compelled to permit individuals to connect side tracks of their own with the tracks of the companies in order to enable the latter to carry grain to warehouses or elevators which have been erected off their lines of road.

In the case of the State vs. Chicago M. & St. P. Ry Co. 131 N. W. 859 the Supreme Court of Minnesota upheld an order of the railroad and warehouse commission of that State directing the railroad to construct a side track from its main line to a stone quarry and crushing plant a short distance from the right of way. The court also held that the construction of the spur was for a public purpose for which the power of eminent domain could be exercised.

There is no question but that a large part of the business of railroads is received over spur tracks which are constructed, maintained and operated not because they serve the public in the general way that depots and freight houses do, but because the nature and extent of the business handled is such as to make it impracticable to handle it at the ordinary shipping station. The furnishing of service of this kind is just as important to the general public as the furnishing of depots and freight houses. It is just as much a public duty and service as that of carrying passengers between stations and is just as important that there should be public regulation of it so that there may be no discrimination in the service, and no arbitrary exercise of the duty as it is to regulate rates and facilities in other directions. In the case of North Carolina Corp. Com. vs. Seaboard Air Line R. Co. 140 N. C. 239, 52 S. E. 941, the reason for governmental regulation and control of this kind of railroad service is well stated as follows:

"The corporation commission act (Laws 1899, p. 292, c. 164,

Sec. 2,) enumerates in 26 subheads the powers conferred upon the corporation commission. Among these, subsection 15 authorizes the commission" to require the construction of side tracks by any railroad company to industries already established or to be established:

Provided, it is shown that the proportion of such revenue accruing to such side track is sufficient within five years to pay the expenses of its construction"—and further restricting the power by forbidding the commission to require the construction of any side track more than 500 feet. The power of the General Assembly to establish a commission to supervise and regulate the rates and operations of quasi public corporations exercising public franchises has been too often decided in the state and federal Supreme Courts to be again discussed. The matter has been discussed, with the citations of authorities, R. R. Connection Case, 137 N. C. 14, 49 S. E. 191 et seq.; Corporation Commission v. Railroad (Rate Case) 127 N. C. 283, 37 S. E. 266; Express Co. v. Railroad, 111 N. C. 463, 16 S. E. 393; and in many others, among them, Corporation Commission v. Railroad ("Track Scales Case") 51 S. E. 793, at this term.

As to this special matter, which arises under subhead 15, authorizing the commission to require the establishment of side tracks for the use of industrial plants, there is, in view of the great industrial development of the state, scarcely any power granted to the commission that is of greater importance. Owing to the exigencies of their business, as well as the greater cost of land immediately at railroad stations and in towns, many factories, and especially most lumber plants, are situated at some distance from any passenger and freight station, though usually on the line of some railroad. To require their products, which are usually shipped in car load lots, to be hauled to a distant station, often over bad roads, when the trains perhaps pass in a few yards of the plant, would entail a great and useless expense, to the great discouragement of such enterprises in our midst. To avoid this the railroads, whenever the receipts in their judgment would justify it, have for years been putting in such sidings, upon which empty cars would be placed when called for, and, when loaded, would be taken away by some passing train. Such sidings are not passenger or freight stations named in subsections 12, 13, 13a, and 14, and have not (except possibly in rare instances) any agent. Prior to the enactment of this provision of the statute the establishment of such sidings rested in the arbitrary will of the common carrier, who could also discontinue such sidings at will. Such powers, it will be seen at once, placed the industrial development of the state at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily discontinuing it if established. This power could be used for both political and pecuniary advantage. Whether it was ever so used or not the General Assembly, while not prohibiting the carrier from continuing to establish such sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the corporation commission to require the establishment of such sidings in proper cases. It did not, however, substitute the arbitrary power of the commis-

sion for the arbitrary power of the carrier, but it gave the former authority to require such sidings only when the "revenue accruing from such side track is sufficient within five years to pay the expense of its construction," and subject also to a review of the reasonableness of such order on appeal to the superior court, and by further review as to the rulings on the law to this court. By a subsequent act (Laws 1903, p. 788, c. 444, amended by chapter 693, p. 1073, of the same year) a penalty is imposed for refusing to receive loaded cars at such side tracks as well as at regular depots or stations, showing that the Legislature was advertent to the distinction and difference between such sidings and 'regular stations.'"

It is not understood that this court in the case of Missouri Pac. Ry. Co. vs. Nebraska 217 U. S. 196 held anything contrary to the doctrine of the above cases. The last paragraph of the opinion in fact sustains the presumption that regulations in relation to spur tracks open to the public generally but to be used principally by a particular industry are valid, if reasonable. The court said, "We are of the opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing and compensation, which is said to have been passed in 1907."

Even if the right to regulate the matter is admitted it does not follow that the railroad should be required to comply with the regulations without reasonable compensation. In the matter of carrying passengers and freight the right to regulate is not denied but the railroad is entitled to receive reasonable compensation for so doing. Also the railroad can fix different rates for different classes of freight and for different classes of passenger service. All that is claimed regarding the matter of spur tracks is, that it is a recognized class of railroad service which the railroad should provide as a matter of public duty for a reasonable compensation.

The only question then left to consider is whether the regulation is reasonable, and that is as to whether the order in the case before the court and under the circumstances of this case, is reasonable.

In the Missouri Pac. Ry. case above cited the Court held that the statute was unconstitutional as applied to the cases before it.

In the case of Wisconsin M. & P. R. Co. vs. Jacobson above cited the court in relation to this point, said, "The only question arising as each case comes up for decision is, whether in the particular case the power has been duly exercised."

And also, "As we have said, it is unnecessary in this case to determine the question of the validity of the whole act with regard to all its provisions and details. We need express no opinion on that subject. We simply here determine that the judgment actually rendered, directing this track connection to be made and thus affording track facilities at Hanley Falls, does not violate the constitutional rights of the plaintiff in error."

In Atlantic Coast Line R. Co. vs. North Carolina Corporation

Commission, 206 U. S. 1, the court says: "The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with powers to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine. Accepting this general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in its character as to transcend the limits of regulation, and to be in effect a denial of due process of law, or a deprivation of the equal protection of the laws.

As the public power to regulate railways and the private right of ownership of such property co-exist and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void, because repugnant to the due process and equal protection clauses of the 14th amendment. The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted.

In coming to consider the question just stated, it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulations not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power has been exercised to so unwarranted a degree as, in substance and effect, to exceed regulation, and to be equivalent to a taking of property without due process of law, or a denial of equal protection of the laws."

Therefore, in the present case, the question before this court is not the validity of the Railroad Commission Law or of sections 1797-11m and 1797-12n, but whether the judgment of the court in this case violates the constitutional rights of the plaintiff in error, Union Lime Co.

It is submitted that the order of the Railroad Commission referred to in this case is reasonable and valid in view of the existing facts and circumstances. The railroad company for a long time has been, and is now, the owner and in possession of and engaged in operating, a spur track (together with branches, switches and sidings) with right of way therefor, at the location in question. This spur track is not controlled by any one other than the railroad company. It was constructed as a part of, and is operated as a part of the railroad system of said company. The railroad company has the right to permit anyone to use it and the Railroad Commission could require its public use. The railroad has volunteered, at its own expense, to furnish spur track facilities at this point, presumably in compliance with its public duty as a common carrier for under no other theory could the tracks be laid

across the public highway. Having undertaken the performance of this duty at this particular point, the present proceeding looks simply to the making of these facilities reasonably adequate to take care of the demands for such service at such place. The state cannot be so impotent in its authority to regulate railroads and service by them as to be powerless to prevent the discrimination between different members of the public as is evident in this instance. The track to be constructed would become a part of the spur already in existence, and there can be no question but that under the Railroad Commission law it would be open to public use as much as any other portion of the railroad property. There is nothing in the particular sections of the statutes which would indicate that the industry served and paying the cost would acquire any rights of ownership in it or any rights of service superior to the rights of any other members of the public having occasion to use it. The provisions as to other industries paying a portion of the cost relates to future extensions and additions to the spur and not to the use of the portion to be presently constructed. The portion of the track already in use is over 2,400 feet in length, and the strip sought to be condemned in this proceeding is 165 feet in length. That spur track facilities are practically indispensable to the operation of stone quarries and lime kilns will undoubtedly be admitted. Such industries deal with a natural mineral deposit and must be conducted where that deposit exists. They cannot, like manufacturing plants, be located in the first instance in close proximity to existing railroad facilities. The railroad facilities must come to them. The great importance of lime, crushed stone and building stone for buildings, streets, roads and sidewalks should be considered in determining the public interest in the use to which this spur is to be put.

It is submitted also that the provisions of the statute are reasonable and just. While the duty is imposed upon the railroad a hearing is provided before the railroad commission before a compliance with the statute is required. The order of the commission in this matter has the same force and effect as any other order of the railroad commission and therefore can be attacked as being unreasonable. (See sections 1797-12n and 1797-16 hereinbefore cited.) Compensation is provided for the railroad. Any person interested can be heard. In this case the plaintiff in error was heard in all proceedings before the commission.

The order of the commission is assumed to be reasonable until shown to be other wise (Section 1797-15.) The burden is on the party attacking the order to show that it is unreasonable.

There is no essential difference between requiring railroads to build spurs and condemn land therefor, and requiring them to make physical connection with private tracks at their right of way or to receive freight in carload lots at other places than their established depots and freight houses. Any regulation of the subject is on the theory that public duties are involved and if that is correct any land taken for the purpose of complying with the order is taken for a public purpose. In the present case if the order of the railroad commission is valid as a reasonable exercise of the police power of the state, which position we maintain, then land condemned for the

purpose of enabling compliance with the order is taken for a public purpose.

In the Jacobson case above cited the court said: "Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error."

The taking of the property of the plaintiff in error in this proceeding of condemnation is a taking for a public purpose, because the purpose of the taking is to enable the railroad to comply with a valid and reasonable order of the Railroad Commission of Wisconsin. The order is reasonable under the presumption of the statute, and is also reasonable in fact.

THE USE IS PUBLIC UNDER DECISIONS IN CONDEMNATION CASES.

In condemnation cases courts have held that land taken for a spur track under conditions similar to those obtaining in this case, is taken for a public purpose. As has been pointed out in the brief on the motion the interpretation of the statute given by the state court is controlling, and the public use should be determined in the light of the state construction of the statute.

The highest court of the State of Wisconsin has held that the track constructed under the statute in question becomes a portion of the trackage of the railroad, is at the service of the public and constitutes an integral part of the railroad system; that the duty to main and operate it rests upon the railroad company and that the track stands in the same relation to it that any other portion of its track does; that the owner of the industry obtains no interest in or control over it beyond that of being served by it equally with anyone else who may desire to use it; that its operation is subject to state control under general laws and neither the railroad nor the owner of the industry can in any respect interfere with such control.

The general public may use the track in question if they desire. They may do so as a matter of right just as they may use any other portion of the railroad's trackage and this right of the public is held by the state court to be the crucial test. "If it is open to the use of anyone who may desire, upon equal terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of anyone else using it, or the extent of such use." It is not essential that the public use the track generally, but that they have the right to do so if the occasion arises.

WELL SETTLED RULE.

The rule laid down by the Wisconsin Court for determining whether land condemned for a spur track is taken for a public use is the general rule in the State Courts.

In 15 Cyc 590, the rule is stated as follows: "A branch or lateral road, spur or switch track necessary to the proper operation of

the main line of the railroad, or which may be necessary to connect important industries, or even a single industry, with the main line or other public highways, provided, however, that the general public has a right to use it, although it may also subserve private interests, is a public use for which private property may be taken under the power of eminent domain."

In a note to Kansas City, etc., R. Co. v. Louisiana Western R. Co., 7 Am. & Eng. Annotated cases 835, the rule is stated as follows: "In accordance with the general rule that land can be appropriated by eminent domain proceedings only for a public, as distinguished from a private use, the right of a railroad company to condemn land for the construction of a spur track to a private establishment depends upon whether the spur is to be constructed for public or for private purposes. If the spur track is to be built solely and exclusively for the benefit and accommodation of the railroad company and of the owner of the private business enterprise, it may well be said that it would serve no public purpose and would be of no public use although the existence of such a track might be of great but indirect benefit to the community by enabling the private enterprise to be carried on, thereby giving employment to labor. But it is held in a majority of the jurisdictions that the mere fact that the primary purpose of such a spur is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right of public to its use, and not by the extent to which that right is or may be exercised. If the spur track may be used by the public generally upon equal terms, not merely by permission but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one, and it is not material that but few persons enjoy it or that it also serves a private use."

In 2 Elliot on Railroads (2d Ed.) it is said on page 515: "And the weight of authority, as well as the better reason, seems to be to the effect that lines of railroad, branches or spurs to mines, manufacturing establishments, and the like are a public use for which land may be condemned, where the general public have the right to use them or to be served without discrimination."

The state courts holding to this rule embrace those of Arkansas, California, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia and Wisconsin, as shown by the following cases:

St. Louis etc., R. Co. vs. Petty, 57 Ark. 359, 21 S. W. Rep. 884.

Roberts vs. Williams, 15 Ark. 43.

Madera Ry. Co. vs. Raymond Granite Co. 3 Cal. App. 668, 87 Pac. 27, citing and approving Ulmer vs. Lime Rock R. Co. 98 Me. 581.

People vs. Blocki, 203 Ill. 363, 67 N. E. 809.

South etc. R. Co. vs. Dix. 109 Ill. 237.

Bedford Quarries Co. vs. Chicago etc. R. Co. (Indiana) 94 N. E. Rep. 326 and other cases there cited. Well considered case.

Dubuque, etc. R. Co. vs. Ft. Dodge etc. R. Co. 146 Iowa 666, 125 N. W. 672.

Dotson vs. Atchison etc. R. Co. 81 Kan. 816, 106 Pac. 1045.

Hurd vs. Atchison etc. R. Co. 73 Kan. 83, 84 Pac. 553.

Chesapeake Stone Co. vs. Moreland (Ky.) 164 S. W. 762.

Riley vs. Louisville etc. R. Co. 142 Ky. 67, 133 S. W. 971.

Kansas etc. R. Co. vs. La. Western R. Co. 116 La. 178, 40 So. Rep. 627, citing with approval C. & N. W. Ry. Co. vs. Morehouse, 112 Wis. 1.

Ulmer vs. Lime Rock R. Co. 98 Me. 579, 57 Atl. Rep. 1001.

New Central Coal Co. vs. George's Creek Coal etc. Co. 37 Md. 537.

State vs. Chicago etc. R. Co. 115 Minn. 51, 131 N. W. 859.

Kettle River R. Co. vs. Eastern R. Co. 41 Minn. 461, 43 N. W. 469.

Chicago etc. R. Co. vs. Porter 43 Minn. 527, 46 N. W. 75.

Kansas etc. Coal R. Co. vs. Northwestern Coal etc. Co. 161 Mo. 288, 61 S. W. 684.

Kipp vs. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237.

Butte etc. R. Co. vs. Montana Union R. Co. 16 Mont. 504, 41 Pac. 232.

National Docks R. Co. vs. Central R. Co. 32 N. J. Eq. 755.

Watson vs. New York Central R. Co. N. Y. 157.

State vs. Toledo etc. R. Co. 24 Ohio Cir. Ct. 321.

Wolfard et al vs. Fisher, 48 Oregon 479, 87 Pac. 530.

Rochester etc. Coal etc. Co. vs. Berwind-White Coal Mine Co., 24 Pa., Co. Ct. 104.

Rudolph vs. Pennsylvania Schuykill Valley R. Co., 166 Pa. St. 430, 31 Atl. 131.

Getz vs. Philadelphia etc. R. Co. 105 Pa. St. 547.

Alfred Phosphate Co. vs. Duck River Phosphate Co. (Tenn.) 113 S. W. 410, citing Ryan vs. Louisville & N. Terminal Co. 50 S. W. 744.

Stockdale vs. Rio Grande etc. R. Co. 28 Utah 201, 77 Pac. 849.

Zircle vs. Southern R. Co., 102 Va. 17, 45 S. E. Rep. 802.

State vs. Superior Court, 42 Wash., 675, 85 Pac. 669.

Caretta etc., R. Co. vs. Virginia etc., Coal Co., 62 W. Va. 185, 57 S. E. 401.

Chicago etc. R. Co. vs. Morehouse, 112 Wis. 1, 87 N. W. 852.

In the case of Chicago, Etc. R. Co. vs. Morehouse above cited the court in construing section 1831a statutes of Wisconsin said:

"It seems that the weight of judicial authority, and the better reasoning, are in favor of the legislation in question. A brief reference to some of the leading authorities will amply show that the fact that a spur track may run to a single industry does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served, without discrimination. In De Camp v. Hibernia U. R. Co. 47 N. J. Law, 43, a leading case, the Court said:

'This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Everyone of the public having occasion to send materials, implements, or machinery for mining purposes into

or to obtain ores from the several mining tracks adjacent to the location of this road, may use this railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public.'

"However, the Court said that where the franchise is in its nature public, like the transportation of freight, and the industry permitted is one that concerns the public, and all who desire to be served by the enterprise can demand service on equal terms, the number who can take advantage of the convenience is not material. In Contra Costa C. M. R. Co. v. Moss, 23 Cal. 323, it was held that what constitutes a public use is a matter resting in the sound discretion of the legislature, and that its will must prevail unless it is guilty of a manifest abuse of power; that the imposition on a railroad company by law of the duty to act as a common carrier, where the primary purpose of the company in building its road is to develop an industry in which the public is interested, renders the use of the property of the railroad public and justifies the legislature in granting it the right to resort to sovereign authority so far as necessary to acquire from private parties the property necessary to its enterprise. Chicago, V. & N. R. Co. v. Porter, 43 Minn. 527, involved every question discussed in this case. The petitioner sought to acquire private property for the purpose of establishing and operating a spur track to a single lumber industry. The evidence showed that the track was to be a part of the petitioner's railway system, was to be used to transport freight to and from the industry at the terminus thereof, and that the principal if not the only freight expected was that to be furnished by the proprietors of such industry directly or indirectly; but that the road was to be open to all persons who might desire such service over it. The right of the petitioner to acquire the land for its right of way was sustained, the Court saying:

'The character of the use, in the case of a railroad or railroad track, does not depend on the amount of business or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have a right to the use of it, it is a public use or interest, though the number who require its use may be small. There is nothing to show that the proprietors of the particular industry are to have any control over or management of the track in question, or to have any right in it other than that of any other person or corporation having business establishments along or near it, to-wit, the right to ship and receive freight upon it carried or to be carried over plaintiff's lines.'

"From the foregoing it will be seen that whether a particular use of property may reasonably be declared public has been solved uniformly according to circumstances. That the agency seeking to take the property by legislative authority is essentially a quasi-public agency, as a railway corporation, has a very important bearing on the question, and likewise has the importance of the particular industry to be promoted; and the two together have generally been deemed controlling. Where the mining of coal is an important industry, it is held that the legislature may legitimately say that

the taking of property for a railroad, indispensable, or reasonably necessary, to the successful operation of a particular coal mine, is a taking of property for public use. Where lumber industries are important factors in the employment and enrichment of the people, the taking of private property for a railroad for the convenience in the main, of the proprietors and patrons of an industry of that kind, is deemed a taking of private property for public use. Where the fertilization of arid lands is deemed material to the development of the country, it is held to be within legislative discretion to declare the taking of private property for irrigating canals a taking of such property for public use. In the early settlement of the country the importance to the general welfare of establishing and maintaining gristmills was such that it was held that the use of the land covered by back water from the milldams was a public use thereof within the meaning of the constitution. The instances are very few where a grant of power to a recognized public agency, such as a railroad corporation, to exercise the power of eminent domain to acquire private property for its right of way, either for its main track or for its side tracks, or spur tracks to be operated as a part of its railway system, the right to declare what shall be deemed a public use being vested primarily in the legislature, has been condemned by the courts. We cannot discover any good reason for condemning the legislative action in question in this case, and therefore must affirm the order appealed from."

In the case of Ulmer vs. Lime Rock R. Co. 57 Atl. 1001 the court said:

"The tests decisive of this question as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission, but as of right, and if the track is subject to government control, under general laws, as are the main lines of a railroad, then the use is a public one, and the Legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track; and, if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity with these requirements, then the power granted by the legislature may be exercised in that particular case.

This is in accordance with the almost unbroken line of decisions of the appellate courts of the various states of this country, brief quotations from a few of which may be advantageous. In De Camp v. Hibernia R. R. Co., 47 N. J. Law, 43, the court said: "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send material,

implements, or machinery for mining purposes into, or obtain ores from, the several mining tracks adjacent to the location of this road, may use the railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public." To the same effect, see National Dock R. R. Co. v. Central R. R. Co., 32 N. J. Eq. 755.

In Kettle River R. Co. v. Eastern Railway Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, the New Jersey case first above cited is quoted from with approval, the court saying: "If all the people have the right to use the road, it is a public use or interest, although the number who have business requiring its use may be very small." In Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75, the court decided that a spur track extending from the main line of a public railroad across private property to a private manufacturing establishment was a public enterprise, the court saying: "The switch track is to be a part of its system of tracks, all belonging to the general enterprise of maintaining and operating a railroad for public use." The court in this case also adopted the test applied in numerous other cases, to the effect that the character of the use does not depend upon the amount of business or number of persons who may have occasion to use, but upon the right of the public to use, and goes on to say that there is nothing in the evidence showing that the manufacturer is to have any control over or management of the road, or any right in it other than that of any person or corporation having business establishments along its line.

In Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659, the court said: "The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which the right is exercised. If all the people have the right to use it, it is a public way, although the number who have any occasion to exercise the right is very small." The earlier Iowa case of Bankhead v. Brown, 25 Iowa, 540, is cited by the court in support of this doctrine. In the case last quoted from, the spur track from the railroad to the private property was constructed by the owner of the private business enterprise under a statute authorizing such construction and the condemnation of property therefor. But the right to take private property, even under such circumstances, was sustained, the court saying: "We conclude, therefore, that a road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it, and that the mine owner who procured it to be established must use the special privilege which the act confers on him in such manner as not to destroy this right of the public or prevent its enjoyment."

"The public character of the use of such a branch track, built under similar circumstances, was sustained in the case of Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448, in which the court said: "We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of private manufacturing establishment, as materially affecting them and giving a private character to their use. All

termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases that it is expected or even that it is intended that such tracks will be used almost entirely by the manufacturing establishment, yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question." Numerous other Illinois cases are cited in that opinion."

The decisions of this honorable court are in line with the reasoning of the above cases as is shown by the case of Hairston vs. Danville & Western Ry Co. 208 U. S. 598.

Furthermore the decision of the highest court of the state as to what constitutes a public use in that state has always been followed by this court.

Hairston vs. Danville & Western Ry. Co. quoted in brief on motion, which brief it is assumed will be considered on this hearing.

CONCLUSION.

In conclusion it is submitted that under the decisions of this court the only question to be decided is whether the constitutional rights of the plaintiff in error are being violated. It is not material to the case that the statutes under which the proceedings are brought might interfere with constitutional rights in respect to circumstances that might be supposed or that might hereafter arise. It is to be expected that the state legislature passed the law and the state courts will enforce the same with due regard to the constitutional rights of the parties affected. If the judgment of the state court to which the writ of error has been taken by the plaintiff in error does not interfere with its constitutional guaranties then this writ should be dismissed and the judgment affirmed. The constitutional guaranties of the plaintiff in error are not violated because it does not appear that the order of the Railroad Commission is so unreasonable an exercise of the police power of the state with respect to railroads as to be invalid, and also because it appears that the use for which the plaintiff in error's property is sought to be taken in this proceeding, is, as held by the Supreme Court of the State of Wisconsin, a *public* use.

L. E. LURVEY.

Attorney for Defendant in Error.
Eden Independent Lime & Stone Co

WALTER DREW.

Of Counsel.

17

FEB 24 1914
JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1913

No. 529

UNION LIME COMPANY,

Plaintiff in Error,

vs.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

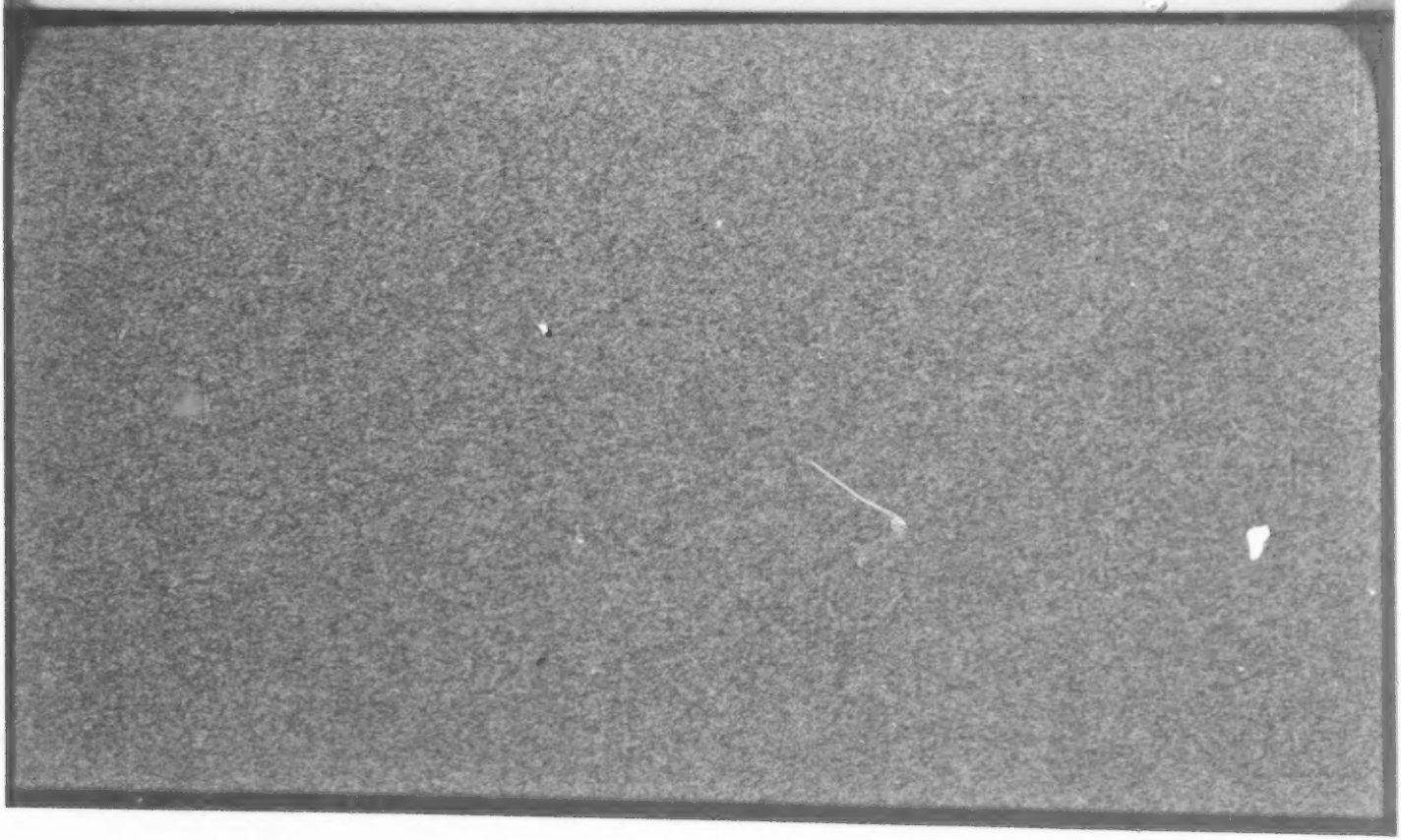
BRIEF BY AMICI CURIAE

AND MOTION.

W. C. OWEN,
Attorney General of the State of Wisconsin,

WALTER DREW,
Deputy Attorney General of the State of Wisconsin.

Amici Curiae.



SUBJECT INDEX

	Page
Act of 1907 does not confer power of eminent domain.. Taking here is under sec. 1831a.	7
Act of 1907 not properly before the court	8–9
Act of 1907 provides for public use	20
Allegations of petition and answer	23–24
Contention of amici curiae stated	6
Divisions of the brief,	
I. A Review of the State Statutes	2
II. A Delegation of the Power of Eminent Domain to a Railroad Common Carrier for the Purpose of Acquiring Right of Way upon which to Construct and Operate a Spur Track as a Part of its System of Railway is not Prohibited by the Fourteenth Amendment of the Construction of the United States	10
III. Under the Statutes of Wisconsin, Land Taken for Right of Way for a Railroad Spur Track, Which a Common Carrier is Ordered by the State Railroad Commission under the Act of 1907 to Construct and Operate, is Taken for Public Use	19
IV. The Exercise of the Power of Eminent Domain under Review in the Instant Case is, under the Law and the Facts, a Taking of Property for a Public Use	23
Fourteenth Amendment prohibits taking for private use conceded	10
Legislature may prescribe measure of reasonableness	9
Morehouse case	14
Nature of the proceeding under review	1
Necessity of the taking a legislative question	9
Public use tested by the resulting public rights	19
Railroad, including spur tracks, a public use	10-11

Reasonableness of common carrier duty under Act of 1907 not before the court 9
Record in the case at bar..... 23
Statutes authorize taking only by public railroad 7
Statutes of Wisconsin,
Section 1797—11m; Act of 1907 5
Section 1820, statutes of 1898 2
Section 1828, statutes of 1898 3
Section 1831a, statutes of 1898 4
Section 1845, statutes of 1898 3
Section 1846, statutes of 1898 3
Union Lime Co. v. Railroad Commission..... 21–22
What is public use largely local question.....12, 13, 14, 17
Wisconsin rule applied in tax case..... 15–16
Wisconsin rule as to public use stated..... 15
Wisconsin rule general in state court..... 18
Wisconsin rule not a theoretical public use..... 17

INDEX OF CASES

	Page
Attorney General v. Eau Claire, 37 Wisconsin, 400	19
Boyd v. Negley, 40 Pennsylvania State, 377	15
Bridal Veil L. Co. v. Johnson, 30 Oregon, 205	15
Brown v. Corey, 43 Pennsylvania State, 495	15
Butte, A. & P. R. Co. v. Montana U. R. Co., 16 Montana 504	15
Cherokee Nation v. Kansas R. Co., 135 U. S., 641	10, 20
Chicago & A. R. Co. v. Suffern, 21 N. E., 824	18
Chicago, B. & N. R. Co. v. Porter, 43 Minnesota, 527	15
Chicago, B. & Q. R. Co. v. Railroad Commission, 152 Wisconsin, 654	10
Chicago, etc., Railway Co. v. Pullman Co., 139 U. S., 79	11
Chicago & Northwestern R. Co. v. Morehouse, 112 Wisconsin, 1	14, 16, 19
Chicago & Northwestern R. Co. v. Union Lime Co., 152, Wisconsin, 633	22
Contra Costa C. M. R. Co. v. Moss, 23 California 323	15
De Camp v. Hibernia U. R. Co., 47 New Jersey Law, 43	15, 17, 19
Dietrich v. Murdock, 42 Missouri, 279	15
Dock Company v. Garrity, 115 Illinois, 155	18
Donnelly v. Decker, 58 Wisconsin, 461	19
Donovan v. Pennsylvania R. Co., 199 U. S., 279	11
Ex parte Bacot, 36 South Carolina, 125	15
Fairfield v. County of Gallitin, 100 U. S., 47	21
Hairston v. Railway Company, 208 U. S., 598	11, 12, 13, 16, 17, 19, 21
Huber v. Merkel 117 Wisconsin, 355	19
Lake Shore, etc. R. Co. v. Ohio, 173 U. S., 285	11
Louisville & N. R. Co. v. Kentucky, 183, U. S., 503	21
Lower v. C. B. & Q. R. Co., 59 Iowa, 563	15
Maginnis v. Ice Company, 112 Wisconsin, 385	16, 19
Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission, 136 Wisconsin, 146	9
National Docks R. Co. v. Central R Co., 32 New Jersey Equity, 755	15
North Central C. Co. v. George's Creek C. & I. Co., 37 Maryland, 537	15

Olcott v. Supervisors, 16 Wallace, 678..... 11
People v. Railway Company, 37 Barb. 216..... 18
Phillips v. Watson, 63 Iowa, 28..... 15
Priewe v. Wisconsin Improvement Co., 93 Wisconsin, 534 19
Railroad Company v. Iron Works, 31 West Virgina, 710 15
Railroad Company v. Nebraska, 164 U. S. 403..... 12
Railroad Company v. Nebraska 217 U. S., 196..... 12
Railway Company v. Petty, 57 Arkansas, 359..... 15
Rex v. Severn & Wye R. Co., 2 B. & A. 645..... 18
Smyth v. Ames, 169 U. S. 466..... 11
State ex rel. N. W. C. R. Co. v. Willcuts, 140 Wisconsin, 448 .....15, 16
Theresa Drainage District, 90 Wisconsin, 301..... 19
Town of Pine Grove v Talcott, 19 Wallace, 666..... 11
Town of Queensbury v. Culver, 19 Wallace, 83..... 11
Union Line Co. v. Railroad Commission, 144 Wisconsin, 523 .....15, 18, 21, 23
United States v. Freight Assn., 166 U. S. 290..... 11
Waddell's Appeal, 84 Pennsylvania State, 90..... 15
Wallman v. R. Connor Company, 115 Wisconsin, 617....16, 19
Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540 18
Whiting v S. & F. L. R. Co., 25 Wisconsin, 167..... 14
Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287..... 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 529

UNION LIME COMPANY,

Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Motion of W. C. Owen, Attorney General of the State of Wisconsin, and Walter Drew, Deputy Attorney General of the State of Wisconsin, for leave to file the following brief as *amici curiae.*

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now come W. C. Owen, Attorney General of the State of Wisconsin, and Walter Drew, Deputy Attorney General of the State of Wisconsin, and, as said officials of the State of Wisconsin, move the court for leave to file herein the following brief as *amici curiae.*

STATEMENT IN SUPPORT OF THE ABOVE MOTION.

His Excellency, Francis E. McGovern, Governor of the State of Wisconsin, has, in due compliance with the laws of the State of Wisconsin, advised that said action is one affecting the interests of the State of Wisconsin and is a proceeding in which the State of Wisconsin has an interest and has authorized and directed the undersigned, upon leave first obtained from this court so to do, to file herein the following brief as *amici curiae*.

This writ of error was sued out for the purpose of reversing the judgment of the Supreme Court of the State of Wisconsin herein upon the ground chiefly that said court erred in holding valid an important public statute of the State of Wisconsin and for the purpose of having said statute declared by this court to be unconstitutional and void.

Said statute is one in terms imposing certain duties upon railroad common carriers and authorizing the Railroad Commission of Wisconsin to determine and prescribe said duties and enforce the same. Said statute is drawn in question in this case because the Railroad Commission of Wisconsin, acting under the provisions thereof, under date of June 30, 1911, made an order in a proceeding before it in which the Eden Independent Lime & Stone Company, one of the defendants in error here, was the petitioner, and the Chicago & Northwestern Railway Company, the other defendant in error here, and the Union Lime Company, the plaintiff in error here, were respondents, wherein it ordered the Chicago & Northwestern Railway Company to extend an existing spur track, connecting with its main line of railway and now terminating upon land of the Union Lime Company, across the land of said Union Lime Company to and upon land of the Eden Independent Lime & Stone Company.

There is pending in the Circuit Court for Dane County, State of Wisconsin, a statutory action brought under section 1797—16 of the Wisconsin statutes, as amended, wherein the said Union Lime Company is plaintiff and the Railroad Commission of Wisconsin is defendant, the purpose of which action is to have the said order of the Railroad Commission of Wisconsin of June 30, 1911, set aside upon the ground that the same is unlawful and upon the ground that the statute of the State of Wisconsin under which the Railroad Commission of Wisconsin acted in making said

order is unconstitutional and void. Said action is an action against the State of Wisconsin challenging the validity of the statutes of the State of Wisconsin drawn in question upon this writ of error in this court and the decision of this court herein will be decisive and controlling of the issues in said action.

In view of the aforementioned circumstances, the undersigned are constrained, as in the proper discharge of their official duties as officers of the State of Wisconsin and as attorneys and counsellors of this court, to ask leave of this court to file herein the following brief as *amici curiae*.

W. C. OWEN,
Attorney General.
WALTER DREW.
Deputy Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 529.

UNION LIME COMPANY,

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CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

The Union Lime Company and the Chicago & Northwestern Railway Company and the Eden Independent Lime & Stone Company, above named as parties to the above entitled action, are hereby notified that the undersigned will, on Monday, the 23d day of February, A. D. 1914, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit the foregoing motion and statement in support thereof to the Supreme Court of the United States, in its court room, at the Capitol, in the City of Washington, District of Columbia; a copy of which motion and statement thereon are hereby delivered to you.

W. C. OWEN,
Attorney General.

WALTER DREW,
Deputy Attorney General.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the motion and statement in support thereof, mentioned therein, are hereby acknowledged this ..... day of February, A. D. 1914.

.....

Attorneys for Union Lime Company.

.....

Attorney for Chicago & Northwestern Ry. Co.

.....

Attorney for Eden Independent Lime & Stone Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 529.

UNION LIME COMPANY,

Plaintiff in Error,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY AND EDEN INDEPENDENT LIME & STONE COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF BY AMICI CURIAE.

This is a writ of error to review the judgment of the Supreme Court and the circuit court of the State of Wisconsin in a condemnation proceeding. It is claimed that the decisions of the state courts were in error in holding that the property sought to be taken is sought to be so taken for a public use. It is further claimed that a statute of the State of Wisconsin to which the right of eminent domain here asserted is assumed to be referable is unconstitutional; that it authorizes the taking of private property for a private use and that the state courts erred in holding otherwise.

The proceedings in question were instituted in the state circuit court by the Chicago & Northwestern Railway Company, a Wisconsin corporation, (hereinafter referred to as the "Railway Company") under the provisions of chapter 87, Wisconsin statutes of 1898, as amended, to condemn for railroad spur track purposes a strip of land thirty feet wide by 175 feet long, said land belonging to the Union Lime Company, a Wisconsin corporation, (hereinafter referred to as the "Union Company").

I.

A Review of the State Statutes.

Chapter 87 is that chapter of the general statutes of Wisconsin, as revised by the revision act, effective September 1, 1898, which provides for the organization of railroad common carrier corporations, prescribes their powers and duties and provides for the regulation of their rates and services. This chapter embraces sections of the Wisconsin statutes numbered from section 1792 to section 1864a, inclusive.

Since the revision of 1898 several new sections have been incorporated into this chapter by the legislature. By chapter 362, laws of 1905, sections 1797—1 to 1797—38, the so-called Wisconsin Railroad Commission law, were enacted. Later, by chapter 352, laws of 1907, entitled, "An Act to Create Sections 1797—11m and 1797—12n of the Statutes, Relating to Spur Tracks," two new sections, so numbered, were incorporated by the legislature into said chapter 87 and into the Railroad Commission law. It is section 1797—11m, as so enacted and as subsequently amended and in force in the year 1911 (hereinafter referred to as the act of 1907), that is challenged as unconstitutional in these proceedings and upon this writ of error.

There are several provisions of chapter 87 of the Wisconsin statutes, as amended and in force at the time of the commencement of these proceedings, which we deem of controlling importance as bearing upon the question before the court, but which have not been referred to upon the brief for the plaintiff in error.

Section 1820, statutes of 1898, which has been in force in that form in Wisconsin for upwards of thirty years, provides in part: (Italics ours)

> "Any number of persons, not less than five, may form a corporation for the purpose of constructing, maintaining and

perating *a railroad for public use* in the conveyance of persons or property or for the purpose of maintaining and operating any railroad already constructed *for the like public use* by making articles of organization in which shall be stated: * * * ."

Section 1828, statutes, likewise in force for many years in that form, provides:

"Every corporation formed under this chapter shall, in addition to the powers conferred on corporations in chapter 85, have power: * * *

"3. *To acquire under the provisions of this chapter* or by purchase *all such real estate* and other property *as may be necessary for the construction*, maintenance and operation of its *railroad and* the stations, depot grounds and *other accommodations reasonably necessary to accomplish the objects of its incorporation;* * * * ."

The "provisions of this chapter," here referred to, are the provisions of sections 1845, 1846, and following sections providing for proceedings in condemnation by railroad corporations, which sections have been in force for many years.

"Section 1845. Any railroad corporation may acquire any real estate which it shall be authorized to take for the purpose of its organization in the manner hereinafter prescribed; * * * ."

"Section 1846. For the purpose of acquiring such title, such corporation may file a petition praying for the appointment of commissioners of appraisal by the circuit court or the judge thereof of the county in which the real estate described in the petition is situate, which petition must be signed and verified by the attorney or some authorized officer of the corporation. If such real estate is desired for station or building grounds or yards and not for a part of its main track, such petition shall state that the corporation is duly incorporated; a description of the real estate sought to be acquired; that the same is required for the purpose of operating such road and that it is the intention of the corporation in good faith to use it therefor; the names of the owners and parties interested therein and such other facts touching the same as shall be deemed fit. * * * "

The statute then proceeds to prescribe what the petition shall state if the real estate is desired for main line construction, and that

"The filing of such petition shall be the commencement of a suit in said court."

Section 1831a, except for an amendment incorporated by chapter 262, laws of 1907, and not important here, was enacted in the present form as chapter 188, laws of 1893, and incorporated in the revision of 1898. This section, omitting the part not here material, reads: (Italics ours)

> "Every railway company existing in whole or in part under any law of this state and operating a railway therein *may build*, maintain and operate *branches and spur tracks from its road or any branch thereof to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumberyard, coal dock or other industry or enterprise*, with all sidetracks, storage tracks, wyes, turnouts and connections necessary or convenient to the use of the same; *and every such company may acquire by purchase or condemnation in the manner provided in this chapter* for the acquisition of real estate for railway purposes, other than for its main tracks, *all necessary roadways and rights of way for such branches, spur tracks*, sidetracks, storage tracks, wyes, turnouts and connections; and every such company may also acquire, in the same manner, such depot grounds, yards, grounds for roundhouses, machine shops, warehouses, storehouses, elevators, docks, wharves and piers as may be necessary and convenient for the enjoyment and use of its road. * * * "

Prior to 1905, the state of Wisconsin had no general or comprehensive statutes for the regulation by public authority of the services and facilities to be furnished by railway common carriers in this state. In that year the legislature enacted chapter 362, laws of 1905, called the Railroad Commission Law, establishing a Railroad Commission of three members, prescribing in general or specific terms the duties of railroad common carriers, and empowering the said Commission to conduct investigations and make orders with respect thereto. This act, with the sundry amendments thereto, since enacted, is incorporated, as above stated, as numbered sections of chapter 87, compiled statutes of 1911, in force at the time of the commencement of these proceedings. The term "railroad," as used in these sections (1797—1 to 1797—38), is defined in section 1797—2 to mean and embrace all corporations, companies, etc., that "own, operate, manage or control any railroad or part of *a railroad as a common carrier* in this state."

As amendatory of these sections, constituting the Railroad Commission law, the legislature of 1907 enacted and incorporated therein section 1797—11m, which section, as subsequently amended by chapter 481, laws of 1909, and chapter 193, laws of 1911, and in

force at the time of the commencement of these proceedings reads as follows:

"1. Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain, and operate a reasonably adequate and suitable spur track, whenever such spur track does not necessarily exceed three miles in length, is practically indispensable to the successful operation of any existing or proposed *mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise*, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest.

"2. Such railroad may require the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; provided, however, that when any such person, firm, corporation or association, shall be required by the commission to deposit with the railroad, the total estimated cost, as herein provided, such person, firm, corporation or association, may offer or cause to be offered, a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such railroad, and conditioned upon the construction of such spur track in a good and workmanlike manner, according to the plans and specifications provided by such railroad, and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and security company bond shall be offered the person, firm, corporation, or association primarily to be served thereby, shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation, or association primarily to be served thereby, shall give the railroad a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expense incurred beyond the amount so deposited with the railroad.

"3. Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, ware-

house, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation, or association shall be required to pay to the person, firm, corporation, or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof, to be determined by the commission, upon such application and notice, to the persons, firms, corporations, or associations that have paid or contributed toward the original cost and expense of acquiring the right of way and constructing the same."

It is claimed on behalf of the plaintiff in error that the statute last above quoted *by implication* confers the power of eminent domain and *prescribes, as the test for the exercise of such power, the necessities of a private enterprise*, that is, authorizes the taking of property against the consent of the owner for private use. We contend:

That said statute does not, either expressly or by implication, create or confer any power of eminent domain;

That the necessity of a private enterprise, referred to in the statute and relied on by counsel for plaintiff in error as showing that condemnation is by this statute authorized for private purposes, is not a test, limitation or condition upon the exercise by a railroad corporation of the power of eminent domain;

That said statute is simply a legislative declaration of the duty of a railroad common carrier to furnish a given class of public railway facilities under certain circumstances and conditions therein prescribed;

That the conditions prescribed, to-wit: that the facility be practically indispensable to the successful operation of an industry or enterprise, that its construction and operation be not unusually dangerous and not unreasonably harmful to public interest, that the spur track be not more than three miles long, and that the one who asks to have the carrier's obligation enforced shall pay the initial cost of construction, *are neither more nor less than a legislatively declared measure of what is reasonable* as to this class of railroad facilities.

We contend further that, even though the power of eminent domain sought to be exercised in this case were referable only to the act of 1907, said act neither authorizes nor requires the taking of

property for a private use and that the record in this case does not show that the use for which the property is here sought to be taken is a private use.

All of these statutes are statutes relating to public railroads, railroads which, in the language of section 1820, are "for public use"; railroads which, in the language of section 1797—2, own or operate "a railroad as a common carrier."

The primary object of such corporations is designated by section 1820 as "the purpose of constructing, maintaining and operating a railroad for public use." Upon such a corporation is conferred by section 1828 the power "to acquire under the provisions of this chapter" all necessary real estate for the construction "of its railroad and the stations, depot grounds and other accommodations *reasonably necessary to accomplish the objects of its incorporation.*" The power to acquire real estate "under the provisions of this chapter" is the power to acquire by condemnation proceedings, as prescribed by sections 1845, 1946 and sections following. It is the judgment in such a proceeding which is brought here for review.

In section 1831a the power to acquire land by condemnation for the purposes of constructing and operating thereon branches and spur tracks is more expressly conferred. But it is conferred only upon railway common carrier corporations and is to be exercised only "in the manner provided in this chapter." The regulative statutes above referred to, the Railroad Commission law, including the act of 1907, are likewise limited in their application to common carrier railroads, that is, railroads for public use.

These statutes fix the status of the condemnor and they declare the use of property taken by it for purposes incident to its business as a common carrier to be a public use. *The status which these statutes give to the railroad corporation and the legal character and the public burden which they fix upon the property taken are controlling considerations fixing the use of the property taken as a public use.*

The act of 1907 nowhere in terms delegates any power of eminent domain to the railway company. It declares a common carrier duty, under certain conditions and limitations, to construct and operate a spur track and provides for compelling the performance of that duty. These conditions and limitations are: (1) that the spur track be practically indispensable to the operation of an industry or enterprise; (2) that it shall not exceed three miles in length; (3) that its construction and operation will not be unusu-

ally dangerous; (4) that it will not be unreasonably harmful to public interest; (5) that the person seeking to compel performance of the duty shall pay the original cost for right of way and construction.

The scope of the common carrier duty prescribed in the act of 1907 is *within* the scope of the power of eminent domain theretofore delegated to the common carrier under section 1831a of the statutes. The *duty* prescribed is, to the extent of these conditions and limitations, *narrower* in scope than the *power* of eminent domain conferred by the pre-existing law. It is idle, therefore, to contend that the act of 1907 confers any power of eminent domain either by implication or otherwise. The railway company *had under the express provisions of the pre-existing law* ample power of eminent domain to acquire right of way for the construction of every spur track which it could be compelled to construct under the act of 1907, as well as those it could not be compelled to construct under that act.

The enumeration in the act of 1907 of the industries and enterprises to which spur tracks are required to be constructed under that act is copied substantially from section 1831a. The result of the differences between these statutes in this respect is simply that the railway company is, *under section 1831a, authorized to exercise the power of eminent domain for the purpose of constructing spur tracks to any industry or enterprise*, whereas, *under the act of 1907, it may be compelled to construct such spur tracks* to such industries or enterprises *only when the conditions named in that act co-exist*. But in either case the power of eminent domain to acquire the right of way for such spur track is exercised under section 1831a. The conditions and limitations prescribed by the legislature, *as a measure of the reasonable service to be required*, in the language of the act of 1907 are, therefore, *not a test or declaration of the character of the use* of such spur track when constructed, either for the purpose of supporting or denying the power of eminent domain to acquire the right of way therefor.

Hence, the act of 1907 is not properly before the court for consideration in this case. It has been drawn in question only by reason of counsel's misconception of its nature, purpose and effect. No reference to the provisions of that act was either necessary or material in the condemnation proceedings brought here for review. True, the *duty of the railway company* to construct the spur track in question was fixed and established by and pursuant to the act of 1907; but *when that duty became fixed that act ceased to have*

further application to the proceedings. It was then the duty of the railway company to proceed under the ample power conferred upon it by section 1851a and to acquire in the manner provided in chapter 87 the necessary right of way. That is what, in legal effect, it did. The unnecessary and immaterial reference by the parties to the act of 1907 does not in law affect the situation.

Had the railway company been moving voluntarily to the construction of the spur track in question, it would have so proceeded without reference on the pleadings to the act of 1907 and it would have had ample power of eminent domain so to proceed under the provisions of section 1851a, the validity of which statute appears to be conceded upon the brief for the plaintiff in error. Certainly, the railway company has no greater power of eminent domain to acquire a right of way for the construction of a spur track when acting on its own motion than when acting under command of the state legislature. We submit that a review of the statutes above referred to is a complete answer to the argument made on the brief for plaintiff in error to the effect that the act of 1907 either authorizes or requires, either in the instant case or generally, the taking of property against the will of the owner for a private use, so far as that argument rests upon the language of that act prescribing the conditions and limitations by which the legislature has measured the *reasonable duty of the railway company* to provide spur track facilities.

The reasonableness of those conditions and limitations as a measure of common carrier duty is not before the court in this case. Insofar as those conditions and limitations might be regarded as measuring the *necessity* for either the construction of the spur track in question or the taking of private property for the right of way for such spur track, they are not before the court.

The question of such necessity is a legislative and not a judicial question.

Lewis, Eminent Domain, Sec. 369 (3d ed.) and authorities cited.

Elliott, Railroads, Sec. 952 (2d ed.) and note 28.

While the legislature may have, under the general provisions of the Railroad Commission law of 1905, requiring railroads to furnish "reasonably adequate services and facilities," prescribed a duty to furnish spur track facilities, committing to the Railroad Commission the ascertainment of what is reasonable in that regard,

Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comm., 136 Wis. 146,

it was competent for the legislature to re-assume the function of *determining for itself and prescribing by statute the measure of reasonable service.*

Chicago, B. & Q. R. Co. v. Railroad Comm., 152 Wis. 654.

This it did in respect to spur track facilities in the act of 1907.

II.

A Delegation of the Power of Eminent Domain to a Railroad Common Carrier for the Purpose of Acquiring Right of Way upon which to Construct and Operate a Spur Track as a Part of its System of Railway is not Prohibited by the Fourteenth Amendment of the Constitution of the United States.

So far as this writ of error is supposed to present a federal question, it rests upon the due process clause and the clause securing equal protection of the laws under the Fourteenth Amendment. It has been established that statutes authorizing the taking of property against the will of the owner for a private use are void under these constitutional limitations. Many authorities to that effect are cited upon brief for the plaintiff in error. We are willing to agree with counsel for the plaintiff in error upon this proposition and with the authorities cited by them in support of it. Further reference to their argument upon this point or to the numerous authorities cited by them is, therefore, unnecessary.

We contend, however, that the taking under the statutes here involved and the taking in the instant case are for a public and not a private use. At the outset of the argument it must be observed that the power to take under section 1831a is conferred only upon corporations organized and authorized to construct and operate railroads for public use and the duty to take is imposed under section 1797—11m only upon common carrier railroads to which alone the Railroad Commission act and the act of 1907, amendatory thereof, apply.

That a common carrier railroad is a public highway, a public purpose, a public use, a public institution has been long established in the decisions of this court.

As supporting the exercise of the power of eminent domain,

Cherokee Nation v. Kansas R. Co., 135 U. S. 641, 657;

As rendering unlawful their contracts injurious to public welfare,

Chicago, etc. R. Co. v. Pullman Co., 139 U. S. 79, 90;

As imposing upon them a duty to refrain from agreements against public interest,

United States v. Freight Assn., 166 U. S. 290, 332;

As supporting the authority of the state to regulate their rates and charges,

Smyth v. Ames, 169 U. S. 466, 544;

and services,

Lake Shore, etc. R. Co. v. Ohio, 173 U. S. 285, 301;

and to require them to make track connections with each other.

Wisconsin, etc. R. Co. v. Jacobson, 179 U. S. 287, 296–7;

As requiring them to permit all persons to use their property upon equal terms,

Donovan v. Penna. R. Co., 199 U. S. 279, 293;

As supporting the exercise of the power of taxation in aid of railroad construction,

Olcott v. Supervisors, 16 Wall. 678, 694, 695;
Town of Queensbury v. Culver, 19 Wall. 83, 91;
Town of Pine Grove v. Talcott, 19 Wall. 666, 676–7.

While these authorities speak with reference to the railroad in a general way, they comprehend the railroad as a whole, including all of its public facilities, all that goes to make up its railroad system. Its legal status as a public highway and the public obligation to serve all who apply upon reasonable compensation and without undue discrimination, impressed by law upon its property, govern alike as to its main line and as to its spur tracks. *We have found no decision of this court, and counsel for plaintiff in error cite none, in which it has been held that a spur track belonging to a public railroad, connected with and used as a part of its railroad system, is not a public use for which property may be taken under the power of eminent domain.*

The only decision of this court dealing with such a situtation cited on the brief for plaintiff in error is

Hairston v. Railway Co., 208 U. S. 598.

In that case it was held that land taken for right of way for a spur track was taken for public use and that the power of eminent domain was validly exercised.

The decisions in *Railroad Co. v. Nebraska*, 164 U. S. 403, and *Railroad Co. v. Nebraska*, 217 U. S. 196, are not in point. The former case dealt with a statute not authorizing the taking of property *by* a public railroad for public use, but the taking of property *from* a public railroad by a private corporation for its private use, neither the railroad, the public nor any public authority retaining any right of use or benefit in or authority of regulation over the property so taken.

In the latter case the statute was, on writ of error taken by the railway company, held void, not as authorizing the taking by the railroad of private property, upon compensation, but *as imposing an unreasonable burden upon the railroad* by requiring it, at its own expense, to construct side tracks and switches to grain elevators, without limitation as to place, number or otherwise and upon the mere demand of the owner of an elevator and without any hearing in court or before any public authority as to the reasonableness of the demand; thus taking the property *of the railroad* without compensation.

In concluding its opinion in this latter case, this court said:

> "We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing and compensation, which is said to have been passed in 1907." 217 U. S. 208.

If that decision was not intended to prejudice the statute of Nebraska, when amended to provide a hearing and compensation, it certainly is not available to prejudice the statute of Wisconsin enacted in 1907 and which not only provides compensation for the railway company and for the land owner, but meets every other objection which the court indicated might exist to such a law as a reasonable regulating statute affecting railroads.

In *Hairston v. Railway Company*, *supra*, the court speaking through Mr. Justice Moody, said:

> "But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that

the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different States by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people." (p. 606.)

"The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that State, is expressed, justified, and acted upon in *Fallbrook Irrigation District v. Bradley, ub. sup., Clark v. Wells, ub. sup.*, and *Strickley v. Highland Boy Mining Co., ub. sup.* What was said in these cases need not be repeated here. No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. In *Missouri Pacific Railway v. Nebraska, ub. sup.*, (164 U. S. 403) it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aërial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state constitution, law, and court approve will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States." (page 607.)

True, in that case there was shown a more extensive public use for the proposed spur track than is shown in this case or may exist in other cases in which condemnation is authorized under the terms of section 1831a of the Wisconsin statutes. It is contended for plaintiff in error here that the use of the spur track here will be only for the purpose of delivering freight to and receiving freight from a particular industry and that such a use is not a public use. That question is reserved by this court in *Hairston v. Railway Co., supra*, in the following language:

"We need not consider whether a condemnation by a rail-

> road, authorized by a state law and approved by the state court, of land for the construction of a spur track to be used solely to transport commodities to the main line and thence to the place of sale and consumption throughout the county, is a violation of the Fourteenth Amendment; nor the authorities bearing upon the question whether such a use is public." (p. 608.)

Without conceding that this language describes the use here, we would direct attention to the decision of the highest court of the state, which opinion assumes that such is substantially the character of the use.

In *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, which was a condemnation case for construction of a spur track under sec. 1831a, the situation as stated by the court was:

> "That the purpose of the respondent was to construct and operate a spur track reaching from a main railway track to a large industry, such spur track to form an integral part of its railway system and to be so operated as to facilitate the transportation of ice for all persons desiring such service, without discrimination." (112 Wis. 8.)

The question was whether this was a public or private use. The opinion may be summarized as follows:

1. A principal of first importance in determining that question, under a constitution such as that of Wisconsin, which does not reserve to the courts as an original question the question whether a particular use shall be deemed public, is that such question is in the first instance legislative and that, unless the declaration of the legislature thereon is manifestly wrong beyond a reasonable doubt, it must be adopted by the courts. (p. 9.)

2. It has been long established in Wisconsin that the public use which justifies the taking of land by condemnation for railroad purposes "consists solely in the fact that the owners cannot, without reasonable excuse, refuse to receive and transport passengers and freight when offered at reasonable rates" and that the state retains the right to regulate the franchise and tolls of the carrier. Citing *Whiting v. S. & F. L. R. Co.*, 25 Wis. 167. (p. 10.)

3. The question being only whether there was reasonable ground "for the legislative recognition of the facility of a spur track as a convenience or necessity for the transportation of freight to and from a single industry, as a matter of public concern falling within the term 'public use,'" is not difficult of solution. The weight of judicial authority and the better reasoning are in favor

of the legislation. Authorities considered: *De Camp v. Hibernia U. R. Co.*, 47 N. J. Law, 43; *Contra Costa C. M. R. Co. v. Moss*, 23 Cal. 323; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527; *Dietrich v. Murdock*, 42 Mo. 279; *Brown v. Corey*, 43 Pa. St. 495; *Boyd v. Negley*, 40 Pa. St. 377; *Waddell's Appeal*, 84 Pa. St. 90; *North Central C. Co. v. George's Creek C. & I. Co.*, 37 Md. 537; *Phillips v. Watson*, 63 Ia. 28; *Lower v. C. B. & Q. R. Co.*, 59 Ia. 563; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Ex parte Bacot*, 36 S. C. 125; *Railway Co. v. Petty*, 57 Ark. 359; *Bridal Veil L. Co. v. Johnson*, 30 Ore. 205; *Butte, A. & P. R. Co. v. Montana U. R. Co.*, 16 Mont. 504; Lewis, Eminent Domain, sec. 171; Mills, Eminent Domain, sec. 14; Randolph, Eminent Domain, sec. 54. *Railroad Co. v. Iron Works*, 31 W. Va. 710, is out of harmony. (pp. 11—13.)

4. "The instances are very few where a grant of power to a recognized public agency, such as a railroad corporation, to exercise the power of eminent domain to acquire private property for its right of way, either for its main track or for its side tracks or spur tracks to be operated as a part of its railway system, the right to declare what shall be deemed a public use being vested primarily in the legislature, has been condemned by the courts. We cannot discover any good reason for condemning the legislative action in question in this case, and therefore must affirm the order appealed from." (p. 14.)

The rule approved in this case is again stated by the Wisconsin Supreme Court in *Union Lime Co. v. Railroad Comm.*, 144 Wis. 523, in the following words:

> "This is the crucial test as to whether or not the track is a private or public one. If it is open to the use of any one who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of any one else using it, or the extent of such use. *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849; *Ulmer v. Lime R. Co.* 98 Me. 579, 57 Atl. 1001." (p. 534.)

Under the statutes of the state of Wisconsin, which provide that railroads shall pay taxes and license fees to the state and that the property of railway companies "necessarily used in the operation of such railroads" shall be exempt from local taxation, the same rule is applied to determine what railroad property is used for public railroad purposes.

State ex rel. Northwestern C. R. Co. v. Willcuts, 140 Wis. 448.

In the opinion of the state court in this case the question and the rule is stated thus:

> "The sole question upon this appeal is, Was the property of the plaintiff taxable by the city of Superior? This question turns on whether the property is exempt from taxation under the statute because of its being used for railroad purposes. It is the contention of respondent that the railroad of plaintiff is not operated for public use and is not a common carrier; therefore its property is subject to local taxation. The plaintiff was organized under ch. 87 of the statutes of this state for public purposes—for the carriage of freight and passengers. No question is made upon this point, but it is insisted that it is operating its railroad for a private and not a public purpose; therefore its property so used is subject to local taxation." (p. 451.)
>
> "The mere fact, however, that a large part of the business of plaintiff was done for the Pittsburgh Coal Company in which it is interested did not deprive plaintiff of its character of common carrier or render its property devoted to a private use so long as it was in fact organized as a common carrier and serving the public in that capacity, although to a limited extent because of location and conditions which limited such service. *Kansas & T. C. R. v. Northwestern C. & M. Co.*, 161 Mo. 288, 61 S. W. 685; *Riley v. Charleston C. S. Co.*, 71 S. C. 457, 51 S. E. 485. Whether the property of plaintiff is devoted to a public use is not determined by the extent of the use, but by the right of the public generally to use it, and the fact that it is used for public purposes by all who desire to use it." (pp. 453–4.)

The *Morehouse Case*, *supra*, and a number of other condemnation cases going upon the same rule are cited in the opinion and *Maginnis v. Ice Co.*, 112 Wis. 385; *Wallman v. R. Connor Co.*, 115 Wis. 617, cited on brief for plaintiff in error here, and other similar Wisconsin cases, are distinguished by the court, pages 453, 454–5.

As said, in effect, by this court in *Hairston v. Railway Co.*, *supra*, what is a public use for which the power of eminent domain may be exercised is largely a question of local public policy to be determined by the constitution, laws and court decisions of the state in which the property sought to be taken is situated. If this court will accord in this case that degree of consideration or deference which in that case it declared it had always theretofore accorded to the decisions of the state courts upon this question, it will have no difficulty in sustaining the judgment of the state court and the validity of the state statutes.

The language of Mr. Justice Moody, speaking for the court in that case, is quite applicable here:

> "The condemnation of land in this case has been held by the courts of Virginia to be authorized by the constitution and laws of that state, and we have no right to review that aspect of the decision. The law of Virginia permits no exercise of the right of eminent domain except for public uses. *Fallsburg Power Company v. Alexander*, 101 Virginia 98; *Dice v. Sherman*, 59 S. E. Rep. 388. Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation." (p. 605.)

In the present case there is an express finding by the trial court, affirmed by the judgment of the Supreme Court of the State, that the taking is for a public use.

From the Wisconsin statutes and Wisconsin supreme court decisions it will be seen that the law in that state makes the test of public use to justify condemnation of right of way for spur tracks the status of the condemnor as a common carrier railroad and the right of the public to use and of the state to regulate and control the use of the facility. We have quoted at some length both from the state statutes and decisions because we believe they merit the thoughtful consideration of this court and that, upon such consideration, they will commend themselves to the approving judgment of this court.

The test of public use which they prescribe is not, as suggested on the brief for plaintiff in error, a theoretical public use. The public use of a spur track operated as a part of a public railroad system, even though it be constructed to a single industry, is real and substantial. Connected with the main line, it is accessible over the main line to all receivers or forwarders of freight on the entire system and to those on connecting systems.

As said in *De Camp v. Hibernia Railroad Co.*, 47 N. J. Law 43:

> "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements or machinery for mining purposes into or to obtain ores from the several mining tracts adjacent to the location of this road, may use this railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public." (p. 47.)

The operating of such spur tracks facilitates the operation of the railroad and improves its public service by securing more prompt loading and unloading of cars and relieving congestion of traffic at main terminals and loading tracks. Furthermore, as said by the Wisconsin court in *Union Lime Co. v. Railroad Commission, supra,*

> "Such track when built becomes a portion of the trackage of the railroad. * * * Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public." (p. 533.)

The same reasoning is applied and in very similar language by the Illinois supreme court in

Dock Co. v. Garrity, 115 Ill., 155, 167.

Moreover, the extent to which such a facility may be used by the public at once it is constructed seldom, if ever, measures the ultimate extent of such use. As with the main line, where the right of the public to use is preserved, the exercise of that right normally grows. A railroad is in its nature permanent.

Western Union Tel. Co. v. Penna. R. Co., 195 U. S. 540, 570.

A railroad, having once established a public facility like a spur track, cannot at its own pleasure abandon it so long as there is any reasonable demand for its continued operation.

Rex v. Severn & Wye R. Co., 2 B. & A. 645;
People v. Railway Co., 37 Barb. 216, 222;
Chicago & A. R. Co. v. Suffern (Ill.), 21 N. E., 824.

The facility once established, the public in increasing numbers place themselves in a position to make direct use of it. Property is easily transferred; highways are easily laid out to it.

The right of the public to use, regulate and control the facility as the test of public use to support condemnation, and not the extent of the use or the number of persons presently to avail themselves of that right, is the test adopted, not only by the Wisconsin statutes and decisions, but by the state courts very generally. Many of the decisions of other state courts supporting this view are cited in the Wisconsin decisions above considered. This rule is supported by authority and based upon reason. It has been a rule

of property in Wisconsin for a generation of time. Neither authorities nor valid argument is advanced why it should not have the approval of this court in this case.

In opposition to this rule, counsel for plaintiff in error cite:

Hairston v. Railway Co., 208 U. S. 598;
De Camp v. Railroad Co., 47 N. J. Law 43;
Wallman v. R. Connor Co., 115 Wis. 617.

In the first of these cases, the question was, as we have already pointed out, not decided but expressly reserved. The second case, so far from supporting counsel's contention, is authority to the contrary and is so cited and quoted by the Wisconsin court in the *Morehouse Case, supra*. The third case is not at all in point, because the situation in that case did not bring it under the rule, the case being one dealing only with a private logging railroad, beginning and terminating on private property and as to which the public had not only no means of access, but also no right of use or control.

For the same reason other Wisconsin cases cited on brief for plaintiff in error are not in point upon the questions here before the court.

Attorney General v. Eau Claire, 37 Wis. 400;
Theresa Drainage District, 90 Wis. 301;
Donnelly v. Decker, 58 Wis. 461;
Priewe v. Wis. Imp. Co., 93 Wis. 534;
Maginnis v. Ice Co., 112 Wis. 385;
Huber v. Merkel, 117 Wis. 355.

III.

Under the Statutes of Wisconsin, Land Taken for Right of Way for a Railroad Spur Track, Which a Common Carrier is Ordered by the State Railroad Commission under the Act of 1907 to Construct and Operate, is Taken for Public Use.

Whether property sought to be taken by a railroad is taken for a public use is determined by the situation resulting from the employment of the property for the construction proposed, the public rights arising with respect to it and the public duties with which it becomes by law impressed. These criteria have been, by this court, applied upon the question of public use with respect to a

railroad under a grant by congress of the power of eminent domain.

Cherokee Nation v. Kansas, etc. R. Co., 135 U. S. 641, 657–8.

The general statutes of Wisconsin, to which we have called attention, fix the legal status of the condemnor as a corporation for the construction, maintenance and operation of a railroad for public use. The Railroad Commission law of 1905 asserts the complete subjugation of all its tracks in the state to public control for public use upon reasonable compensation to the carrier and without undue discrimination. The spur track law of 1907, itself, fixes the status of a spur track constructed and operated thereunder as a public facility charged with the right of the public to use and the duty of the carrier to serve all who may apply for service thereon upon equitable terms.

This act provides the "*railroad* shall acquire" the right of way. The "railroad *may* require" "the person or persons" "*primarily* to be served" to pay to the railroad the cost to the railroad of acquiring the right of way and construction of the track. There is no provision giving the person or persons so advancing such cost any interest or title in the property taken. The necessary effect is that the property taken and the spur track constructed thereon become the property of the railroad and a part of its railroad system. As such it becomes at once charged with all the public rights and duties by the statutes imposed upon the property of common carriers.

The act of 1907 expressly provides that any person so desiring may, *as of legal right*, have "a connection with such spur track" upon application to the Commission and payment to those who have borne the original cost of "an equitable proportion thereof." Thus, in addition to the right to use the facility in all usual and ordinary ways, the right is secured to any other person so desiring to have track connections with such spur track. The public character of the use is not affected by the fact that the railroad may require the cost of the spur to be defrayed by those primarily to be served in the first instance, or that those defraying such first cost are given contribution as against others subsequently receiving track connections therewith. While the track is a public one, which all the public have a right to use, it is of greater benefit to those to whose industries or enterprises it is constructed and to those who thereafter have track connections therewith. It is certainly within the province of the legislature to prescribe the reasonable com-

pensation which shippers shall pay for such benefits and service. To be public, the service or facilities of a common carrier need not be placed at the disposal of shippers or the public *gratis*.

Whether the use in such a case is public depends upon the rights of the public to use under the constitution and laws of the state, as construed by its courts. The construction adopted by the state court upon a local question will be deferred to by this court.

Hairston v Railway Company, supra;

Fairfield v. County of Gallatin, 100 U. S. 47, 52, Cases cited and Rose's notes;

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 508.

The Wisconsin supreme court, in *Union Lime Co. v. Railroad Commission*, 144 Wis. 523, has construed the laws of that state as fixing the status of a spur track which a railroad is required to construct under the act of 1907 as a public facility, and has held that property taken by a railroad for right of way for such a spur track is taken for a public use. In the course of this opinion, it is said:

> "Plaintiffs challenge the constitutionality of the statute on the ground that the side tracks provided for are private, and that land taken for right of way for such side tracks is taken for a private and not for a public use, contrary to the provisions of sec. 13, art. I, of the constitution of this state, and contrary to the provisions of the XIVth amendment to the constitution of the United States. If it be conceded that the side tracks are private, then the objections raised by plaintiffs must be deemed well taken. But the case of *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, negatives such a concession. It was there held that the taking of land for a side track under sec. 1831a, Stats. (1898), was a taking for a public use even though the side track ran to a single industry and the owners thereof were to bear a large part of the expense. That section authorized a railroad company, in its discretion, to acquire right of way by condemnation for a spur track not exceeding five miles in length to any industry therein mentioned, without any restrictions as to its being practically indispensable to the successful operation thereof, or unusually unsafe and dangerous, or unreasonably harmful to public interest. If it was a valid exercise of legislative power to authorize a railroad company, in its judgment, to condemn a right of way for a spur track five miles in length without any restrictions as to public safety or interest, it must certainly be held to be so to authorize the Railroad Commission to order a spur track two miles in length to be built

under the safeguards to public interests provided by sec. 1797—11m, stats. (Laws of 1909, ch. 481).

"Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it. And this is the crucial test as to whether or not the track is a private or public one. If it is open to the use of any one who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of any one else using it, or the extent of such use." *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001. That such tracks are to be open to the use of the public generally is clearly evidenced by the statute, for it speaks of the industry *primarily* to be served and makes provision for others securing the same service by sharing in the initial cost, thus evincing a clear intent to subject the track, upon equitable terms, to the use of any one who may require it. Its operation, too, is subject to state control under general laws, and neither the railroad nor the owner of the industry can in any respect interfere with such control. The reasons for holding the provisions of sec. 1831a, Stats. (1898), constitutional apply more strongly to the provisions of sec. 1797—11m, and they are so clearly set forth in the case referred to that a more extended discussion of the subject here is not deemed necessary." (pp. 532—534.)

Upon the authority of its decision above quoted from, The Wisconsin Supreme Court affirmed the judgment of the circuit court in this case.

Chicago & N. W. R. Co. v. Union Lime Co. 152 Wis. 663.

We submit that the decisions of the Wisconsin court should be given controlling effect in this case, not only as decisions resting upon the construction of the state constitution and laws by the highest court of the state, but also because the decisions of the state court will, upon the reasoning and authorities given in support of their conclusions, commend them to the approval of this court.

IV.

The Exercise of the Power of Eminent Domain under Review in the Instant Case is, under the Law and the Facts, a Taking of Property for a Public Use.

The highest court of the state has held that the right to condemn the property sought to be acquired is properly asserted under the statutes of the state. That question will not be reëxamined here. What has already been said on behalf of the constitutionality of the statutes largely covers the question considered as confined to the situation presented in the case at bar. All that was said by the Wisconsin court in *Union Lime Co. v. Railroad Commission*, *supra*, upon the question before this court applies to the facts in this case, for that decision dealt with the same situation, the same spur track.

The record here brings the case clearly within the rule as to public use as established under the laws and decisions of the state. The Railway Company's petition in condemnation alleges, in substance, that it is a railroad corporation, organized under the laws of the state of Wisconsin and other states; that it operates a system of railroad in Wisconsin and several other states; that said railroad system is operated for the transportation of freight and passengers and general railroad business; that the railway company owns and operates a spur track (with branches, switches and sidings) with the right of way therefor extending from one of its main lines into and partly through the lands of the Union Company; that the spur track which petitioner desires to construct will not, together with the track by which it will be connected with the main line, exceed five miles in length; that the real estate is sought to be taken for the purpose of constructing, operating and maintaining an extension of the petitioner's existing spur track and that it is the purpose of the petitioner in good faith to use the real es-

tate, described and mapped out, for the purposes set forth. (Trans. pp. 9–12.)

The answer of the Union Company admits the allegations of the railway company's petition and alleges "that the use for which petitioner seeks to take the lands of this defendant described in the petition herein, is a private use and not a public use." (Trans. pp. 13–14.)

Both petition and answer alleged proceedings before the Railroad Commission under the act of 1907, which allegations we conceive, upon reasons already stated, to have been unnecessary and immaterial, and the answer challenges the constitutionality of that act. (Trans. pp. 10–11, 13–15.)

The matter was heard in the circuit court upon petition and answer. The court found all of the material allegations of the petition as alleged and "that the use for which said lands is sought to be taken and condemned is a public use."

The petition is criticized upon the brief for the plaintiff in error (page 6), in that it does not allege in terms that the land sought to be condemned is required for or intended to be used for a public use. At page 41 of the same brief it is argued that the finding of the trial court "that the use for which said lands is sought to be taken and condemned is a public use," cannot aid the judgment, because that finding is in the nature of a conclusion of law. For the same reason it was unnecessary to plead such an allegation in the petition. Also, for the same reason, the allegation to the contrary effect in the answer was not binding upon the court.

The situation presented to the circuit court upon the admitted facts was that of a public railroad praying the right to take property of the defendant by condemnation for the purpose of extending a public spur track connected with its main line of railroad and a part of its railroad system. Under the constitution and laws of Wisconsin, as construed by its highest court, land taken by a railroad corporation for such a purpose is taken for a public use and the trial court correctly so held.

Respectfully submitted,

W. C. OWEN, *Attorney General of the State of Wisconsin.*
WALTER DREW, *Deputy Attorney General of the State of Wisconsin,*
Amici Curiae.

Service of the foregoing brief is hereby accepted and delivery of a copy thereof is hereby acknowledged this.....day of February, A. D. 1914.

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Attorneys for Union Lime Company.

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Attorney for Chicago & Northwestern Ry. Company.

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Attorney for Eden Independent Lime & Stone Company.